No. _____

92-8049

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ALFRED ARTHUR SANDOVAL, Petitioner

v.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

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QUESTIONS PRESENTED

I. Was petitioner deprived of due process and a fair jury trial by the use of constitutionally defective reasonable doubt instructions which invited the jury to base its verdict on improper "moral" considerations rather than on an evidentiary evaluation? (Cage v. Louisiana, 498 U.S. 39 (1990); Sullivan v. Louisiana, ___ U.S. ___ (June 1, 1993).)

II. Was petitioner deprived of due process and freedom from cruel and unusual punishment by the California Supreme Court's failure to conduct a constitutionally adequate harmless error review of the fundamental error recognized in the penalty phase? (Parker v. Dugger, 498 U.S. 308 (1991).)

III. Does the California Supreme Court's astronomical affirmance rate since 1990, outstripping every other capital sentencing jurisdiction in the country, demonstrate a pervasive abdication of its responsibility to conduct constitutionally adequate harmless error review, leaving unredressed the constitutional violations in petitioner's case? (Pensinger v. California, 116 L.Ed.2d 290 (1991) [O'Connor, J., joined by Kennedy, J., dissenting from denial of certiorari, finding the California Supreme Court's "cursory review . . . clearly insufficient"].)

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

Petitioner Alfred Arthur Sandoval hereby petitions for a writ of certiorari to the Supreme Court of California to review its decision affirming his convictions for murder and judgment of death.

I. OPINION BELOW

On December 14, 1992, the California Supreme Court issued a decision affirming petitioner's convictions for murder and sentence of death. This opinion is reported at 4 Cal.4th 155 (1992), a copy of which is attached hereto as appendix A.

II. JURISDICTIONAL STATEMENT

The judgment of the California Supreme Court, affirming petitioner's convictions and death sentence, was entered on December 14, 1992; a petition for rehearing was denied by Order of the California Supreme Court on February 10, 1993. A copy of that Order is attached hereto as appendix B. On April 29, 1993,

this Court granted an extension of time through and including June 10, 1993 to file this petition for writ of certiorari. (No. A-822). This Court has jurisdiction pursuant to 28 U.S.C. section 1257a.

III. CONSTITUTIONAL PROVISIONS

The United States Constitution, Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

The United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

The United States Constitution, Amendment VIII:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The United States Constitution, Amendment XIV:

> "No State shall make or enforce any law which shall abridge the privileges or immunities to citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws."

IV. STATEMENT OF FACTS

Petitioner was charged in Los Angeles County Superior Court with four counts of murder arising from two incidents occurring in October of 1984. Trial lasted from October 1986 through March 1987. It took the jury two days to return verdicts regarding the October 13, 1984 shootings, in which petitioner acknowledged involvement (but denied culpability for first degree murder), and thirteen days to return verdicts as to the October 31st shootings, in which petitioner denied any involvement whatsoever. The length of the jury deliberations demonstrates considerable debate and difficulty among the jurors

in reaching these verdicts. Moreover, regarding penalty trial, the jury deliberated for five days, from March 12 through March 18, during which time it asked a number of questions of the court and in fact declared a virtually even-split deadlock on March 18, the day before verdicts were reached. The penalty verdicts in this case themselves reveal a fundamental anomaly in California capital sentencing process, with the jury returning three verdicts of life and a single verdict of death, hardly an unambiguous declaration that death was the appropriate punishment and obviously irreconcilable with instructions which directed them to consider the same overall corpus of aggravating and mitigating evidence as to each verdict.

In summary form, the October 13, 1984 shootings occurred in a park in East Los Angeles, where petitioner acknowledged shooting three other Hispanic males, of which the two decedents were shown by post mortem blood analysis to be heavily intoxicated with PCP. Petitioner contended that these shootings were in self-defense, when he arrived at the park in the midst of a fight occurring between these men and another individual.

The October 31, 1984 offenses involved the shootings of Ray and Marlene Wells in their home late in the evening. Ray Wells was a local crime figure involved in drug dealing, receipt of stolen property, and other illegal activities. There were no eyewitness identifications of any perpetrators of that shooting, nor any physical evidence demonstrating petitioner's presence at the time of the offense. The prosecution's principal evidence consisted of bargained-for informer testimony regarding

uncorroborated admissions, whose authenticity was vigorously challenged at trial. Petitioner presented an affirmative alibi defense to these charges as well.

V. PRESENTATION OF THE FEDERAL CLAIMS IN STATE COURT

Each of the claims presented in this petition was raised and presented to the California Supreme Court, either in the appellate briefing, or in the petition for rehearing after the constitutionally inadequate harmless error review was revealed. After the Supreme Court found explicit prosecutorial misconduct in penalty phase in the form of argument that a particular biblical passage supported imposition of the death penalty in this case and that such a jury verdict in this case would be "doing God's work," the California Supreme Court nonetheless affirmed based on a summary reference to factors which since time immemorial have weighed in favor of reversal, not affirmance – the length of jury deliberations and the closeness of the case. Petitioner timely petitioned for rehearing on the ground, inter alia, that the court had "entirely abdicated its responsibility to conduct a constitutionally sufficient analysis of prejudice in conformity with the requirements of the Eighth and Fourteenth Amendments," citing Parker v. Dugger, 498 U.S. 308 (1991) and Clemons v. Mississippi, 494 U.S. 738 (1990) (Petition for Rehearing, argument V, p. 14).

VI. REASONS FOR GRANTING THE WRIT

A. The Constitutional Defects in the California Reasonable Doubt Instruction

The California reasonable doubt instruction given in

this case[1] is derived from the statutory language of Penal Code section 1096, a provision cloned from a definition proposed by the Massachusetts Supreme Court in 1850 (Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320 (1850)). This instruction, with its repeated use of the phrase "moral," first with respect to "moral evidence" and then with respect to "moral certainty," improperly diluted the prosecution's constitutionally imposed burden of proof beyond a reasonable doubt.

1. The due process deficiencies identified by Cage v. Louisiana and subsequent cases

This Court has recently held the reasonable doubt instruction of another state unconstitutional because of deficiencies which included a qualifying phrase "to a moral certainty," the same language contained in CALJIC 2.90. (Cage v. Louisiana, 498 U.S. ___, 112 L.Ed.2d 339 (1990). Cage held that the "moral certainty" language in conjunction with other problems in the instruction unconstitutionally permitted a "finding of guilt based on the degree of proof below that required by the Due Process Clause" (112 L.Ed at 342). More than two decades ago, In re Winship 397 U.S. 358, 364 (1970) held that "the Due Process

[1] The court delivered CALJIC 2.90 as follows:

"The defendant in a criminal action is presumed to be innocent until the contrary is proved. And in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." (RT 798.)

Clause protects the accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." The Louisiana instruction "did at one point instruct that to convict, guilt must be found beyond a reasonable doubt" (Cage v. Louisiana, supra, 112 L.Ed.2d at 342), but acquired unconstitutional baggage by purporting to define or explain reasonable doubt with such synonyms as "grave uncertainty", "actual substantial doubt", and "moral certainty" that the defendant was guilty. Cage specifically condemned "the reference to 'moral certainty' rather than evidentiary certainty" (ibid.).

The key point is obviously that the Due Process Clause ensures the defendant's "right to have the jury deliberate solely on the basis of the evidence. . . . " (Taylor v. Kentucky (1978) 436 U.S. 478, 489), rather than on the basis of the jurors' moral disapproval of the defendant's conduct.

Many other courts have identified the same problem with a reasonable doubt instruction which includes a "moral certainty" qualifier – "moral certainty could be interpreted to mean that the certainty is based on feeling, i.e., moral conviction, rather than facts" (United States v. Indorato, 628 F.2d 711, 721, fn. 8 (1st Cir. 1980)). Perez v. Irwin, 963 F.2d 499 (2d Cir. 1992) echoed "the concern . . . that the use of these words ['doubt to a moral certainty'] might lead a jury to reach a verdict based on feelings rather than on the facts of the case before it." (State v. Manning, 409 S.E.2d 372 (S.C. 1991) [reversing capital murder conviction because of due process deficiencies in "moral certainty" reasonable doubt instruction].) (Accord, People v.

Hewlett, 519 N.Y.S.2d 555, 557 (App.Div. 1987) [holding instruction defining reasonable doubt in terms of "moral certainty" and "reasonable degree of certainty" reversible error]; Dunn v. Perrin, 570 F.2d 21, 24 (1st Cir. 1978); United States v. Nolasco, 926 F.2d 829 (*en banc*) (9th Cir. 1992) [rejecting efforts to assign confusing and potentially diluting explanations to the reasonable doubt standard].)

2. The archaic antecedents of the "moral certainty" language in California

The language of CALJIC 2.90 tracks Penal Code section 1096, enacted by the Legislature in 1872, and amended in 1927 to include the specific language criticized and condemned in the above-cited cases. Penal Code section 1096a states that "in charging a jury, the court may read to the jury section 1096 of this code, and no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given." As noted above, the section 1096 definition was uncritically cloned from a definition proposed by the Massachusetts Supreme Court in 1850 (Commonwealth v. Webster, supra, 59 Mass.(5 Cush) 295, 320). The tenuous history of this language was discussed in detail in Justice Mosk's thoughtful and scholarly concurring opinion in People v. Brigham 25 Cal.3d 283, 292-316 (1979).[2] Justice Mosk pointed out that "the 1850 language of Chief Justice Shaw was already obsolete in 1927, and

[2] Brigham disapproved a different definition of reasonable doubt contained in former CALJIC 22, and did not address the constitutionality of its successor, CALJIC.2.90. Justice Mosk urged the Court to "acknowledge the equally glaring deficiencies . . . of CALJIC 2.90," noting that "[t]he need to do so is obviously more pressing" (25 Cal.3d at 292-293).

it is hopelessly superannuated" by the time of the Brigham decision in 1979 (25 Cal.3d at 295). Justice Mosk then suggested precisely the same solution indicated by this Court in Cage v. Louisiana – to simplify the reasonable doubt instruction to omit any purported explanation or further definition of the easily understood term "reasonable doubt" (25 Cal.3d at 307-316; 112 L.Ed.2d at 342 fn.*).

3. The unconstitutional aspects of CALJIC 2.90

a. The gratuitous allusion to "moral evidence"

There are two defects in CALJIC 2.90. The first is the gratuitous and confusing qualifier that proof beyond a reasonable doubt "depend[s] on moral evidence" (emphasis supplied). What is this "moral evidence" business?[3] While never explained, it certainly suggests a substantial contrast to "factual evidence." Proof of guilt in a criminal proceeding should be limited to evidentiary facts and the logical inferences which may be drawn from them. A determination of guilt is not a place for moralizing, ethical pronouncements, or other similar subjective considerations.

[3] Justice Mosk posed the same question in Brigham, supra – "What in the world is moral evidence?" (25 Cal.3d at 295).

An historical answer is found in Shapiro, *To a Moral Certainty: Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 Hastings L.Rev. 153 (1986). Professor Shapiro traces the phrase "moral evidence" to a now-defunct usage among the educated classes of England and America in the 18th and 19th centuries to refer to testimonial evidence as opposed to physical evidence (id. at 181-184). That meaning has been entirely lost during the past century. Similarly, the phrase "to a moral certainty" connoted (a century ago) the highest possible degree of proof relating to events in the real world, always one notch short of the absolute certainty available only to the physical or mathematical world (id. at 157-158). Professor Shapiro urges that these archaic phrases be scrapped because they do not carry today the particular meaning carried more than a century ago when engrafted into American jurisprudence (id. at 192-193).

However, the phrase "moral evidence" conjures up quasi-religious proceeding in which the faithful "bear witness" to the sins of humankind. The phrase "moral evidence" implicitly legitimizes the jurors' consideration of subjective, ethical concerns raised by the conduct involved. This is wrong because a criminal trial is not an exercise in moral, ethical, or religious judgment; it is an exercise in the objective determination of whether particular events occurred.

In this vein, the phrase "moral evidence" could (again improperly) connote to jurors the concept of evidence regarding the morality of the accused's conduct, again a factor essentially irrelevant to the proper determination of guilt of a particular offense. In sum, the qualifying phrase characterizing the type of proof involved in the trial as "moral evidence" serves only to superimpose an irrelevant subjective/ ethical standard of proof for an objective/factual one.

b. The diluting effect of the qualifier "to a moral certainty"

Next, the concluding phrase "to a moral certainty" has many of the same defects, but exaggerates them. How many times have we as individuals felt "morally certain" that a certain state of events was true, and acted on that certainty, all the while acknowledging that the facts which could actually prove the point were unavailable to us. For example, employers, particularly conscientious ones, make such serious decisions as the firing of an employee when convinced to a moral certainty that the employee has been stealing, while freely acknowledging that the factual "evidence" of theft would not establish guilt

beyond a reasonable doubt. Similarly, parents confront this situation on a daily basis in determining whether their children have or have not done some particular mischief, and act on their beliefs, even though they would most likely not convict the child if put on trial in some hypothetical form of juvenile court with a "beyond a reasonable doubt" standard.

Moreover, the pernicious effects of the phrase "to a moral certainty" are exaggerated where the accused was clearly engaged in some form of conduct viewed as "immoral" by mainstream society, which typically includes the jurors in a case. For example, petitioner here had clearly been involved in the type of violent gang-related activity which is pervasively viewed as rending the City of Los Angeles apart.

Thus, the jury was certainly convinced to a "moral" certainty that appellant was engaged in, from a mainstream view, immoral activities and was most likely an immoral person under that standard. Thus, the instructional language served to obscure the otherwise crucial segregation in the jurors' minds between personally negative responses to the defendant versus the analysis of the prosecution's evidence. The case law set forth in part A above confirms the constitutional defect of inviting the jury to substitute their moral feelings for their impartial analysis. (See also State v. Williams, 828 P.2d 1006, 1029 (Ore. 1992) [Unis, J. dissenting] ["the (moral certainty) instruction here could have been interpreted by the jury to allow its verdict to rest on an improper basis, i.e., moral standards of consideration, rather than evidentiary certainty"]; State v. Manning, supra, 409 S.E.2d at 374 ["moral certainty" instruction

"is misleading in that it allows a juror to base a finding of guilt upon a subjective feeling rather than upon an evaluation of the evidence"].)

In sum, the repeated use of the adjective "moral" in the California beyond a reasonable doubt instruction unconstitutionally draws the jury away from its role as an objective evaluator of the evidence into a more subjective arbiter of moral values.

4. The Reversal Per Se Standard

Sullivan v. Louisiana, supra, recently held that an unconstitutional reasonable doubt instruction requires reversal per se because "the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings" (emphasis in original). Thus, no analysis of prejudice is necessary to determine that reversal is required in this case, but the closeness of the case and the jury's manifest difficulty in reaching guilty verdicts should provide an impetus to see that justice is done in this case.

B. The Manifest Deficiencies of the California Supreme Court's Harmless Error Review in This Case

The California Supreme Court explicitly found prosecutorial misconduct in penalty argument in the form of an assertion to the jury that a particular biblical passage (Romans 13:1-7) affirmatively justified imposing the death penalty in this case, and that a death verdict against petitioner would be a form of "doing God's work," in fact a positive gesture toward appellant to help him "get his soul right" (4 Cal.4th at 192-193). When this argument occurred at trial, defense counsel objected, but

the trial court's refusal to remedy the misconduct cloaked it with a judicial imprimatur. The California Supreme Court, while recognizing the misconduct, entirely abdicated its responsibility to conduct a constitutionally adequate analysis of prejudice in conformity with the requirements of the Eighth and Fourteenth Amendments (Parker v. Dugger, supra; Clemons v. Mississippi, supra). The Supreme Court's rejection of prejudice consumed a scant two sentences and, inexplicably, simply referred to two facts regarding the course of deliberations, facts which from time immemorial have weighed in favor of a finding of prejudice. The length of jury deliberations (five days), coupled with the closeness of the jury split prior to its decision (six-six on two counts and seven-five on two others), in conjunction with the eventual return of three life verdicts versus one death verdict, provides an overwhelming basis to infer prejudice, not the absence of prejudice. Indeed, these factors demonstrate a virtual evidentiary equipoise regarding the penalty determination, and render it far more likely that the improper and inflammatory argument tipped the balance in favor of the one death verdict.

The federal courts have spoken with one voice that lengthy and close jury deliberations weigh in favor of a prejudice finding when a constitutional error has occurred. The California courts were equally clear on that point until this decision. However, without any analysis, the California Supreme Court found that the constellation of jury deliberation factors universally held to support a finding of prejudice inexplicably satisfied the state's burden of proving the misconduct harmless beyond a reasonable doubt. (Chapman v. California, 386 U.S. 18

(1968).) This is yet another in a painful and protracted series of cases in which the California Supreme Court has expanded the harmless error rule in capital cases "beyond the breaking point" (In re Marquez 1 Cal.4th 584, 610 (1992) [Kennard, J., dissenting]), and beyond the pale of the Eighth and Fourteenth Amendments. (See Kessler, "Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases – a Comparison and Critique," 26 U.S.F. L.Rev. 41, 89 (1991); Uelmen, "How the Justices Stack Up," Los Angeles Daily Journal, California Supreme Court Round-up (June 4, 1993).)

Federal courts applying harmless error review to prosecutorial misconduct or other error in a capital case have uniformly found the factors found by the California Supreme Court in this case to militate in favor of reversal. Drake v. Kemp, 762 F.2d 1449, 1459 (11th Cir. 1985) granted habeas corpus relief in a capital case because of prosecutorial misconduct in penalty argument. The nature of the misconduct was much less egregious than in this case, consisting merely of reference to old state judicial decisions which suggested that mercy was an inappropriate consideration in the penalty determination. The Eleventh Circuit found prejudice because of the closeness of the case as to guilt, as indicated by the length of jury deliberations (id. at 1461 ["the jurors deliberated at length before finding Drake guilty"]). Drake cited and relied on Brooks v. Kemp, 762 F.2d 1397, 1402, fn. 27 (11th Cir. 1985) in support of the proposition "that it is appropriate . . . to consider weakness in the evidence of guilt since an important aspect of the jurisprudence is to minimize the risk that an innocent person

will be executed." In this case, the jury not only deliberated for five days at the penalty proceeding, but the jury had deliberated for 13 days with respect to the guilty verdict to which the death judgment related.

Similarly, Newlon v. Armontrout, 885 F.2d 1328, 1337-1338 (8th Cir. 1989) reversed a death sentence because of prosecutorial misconduct in argument, again pointing out the length of jury deliberations before arriving at a verdict as one factor favoring a finding of prejudice. (Accord: United States v. Duncan, 850 F.2d 1104, 1113-1114 (6th Cir. 1988) [reversing conviction because of confusing jury instruction noting that "[t]his was a conscientious jury that deliberated for parts of two days before it asked its questions, deliberated for several hours more after receiving the answers before pronouncing itself deadlocked, and then took several more hours into the next day before reaching its verdicts"].)

The nature of the prosecutor's misconduct in directing the jury to use religious law in its penalty determination to supplement or substitute for secular law was particularly likely to cause prejudice given the evidentiary equipoise between aggravating and mitigating evidence in this case. While petitioner had been convicted of four murders, and evidence of prior violent conduct had been admitted, he presented a very strong case in mitigation of a very brutal and deprived background in an East Los Angeles barrio war zone, in spite of which petitioner demonstrated very strong family ties and the clear capacity for institutional adjustment and conformity, a virtual recipe for a life sentence rather than a death sentence.

Under these circumstances, it is highly likely that the jury resolved its four-day deadlock by recourse to the prosecutor's religious argument. The otherwise anomalous result of affording an individual defendant three life verdicts but one death verdict, where each verdict was necessarily based on the same corpus of aggravating and mitigating evidence unless the jurors violated their instructions, suggests some bizarre and unconstitutional reasoning process in which the jurors afforded the defendant three life verdicts based on his mitigating evidence, and then imposed a single death judgment based on the prosecutor's argument that religious authority not only authorized the death sentence but such sentence was in fact in petitioner's best interests, i.e., a chance "to get his soul right." The prosecutor's most obvious intrusion on the jury's sense of secular responsibility was his exhortation that the imposition of the death penalty in this case would be a form of "doing God's work." Thus, the actual pattern of penalty verdicts provides strong circumstantial evidence indicating that the jury did use the prosecutor's improper argument as the mechanism to resolve their preceding deadlock. The prosecutor's religious argument appears to have been just the balm needed for the pro-life jurors to assuage their consciences for returning a single death judgment. The clear point of the prosecutor's argument was to diminish the jury's sense of responsibility for its penalty decision. (See Caldwell v. Mississippi, 472 U.S. 320 (1985).) The prosecutor in effect told the jury that a vote for death would be in accordance with religious authority, a balm to their consciences, and in fact would be consistent with any feelings of

mercy or leniency they felt toward petitioner. The prosecutor's co-optation, accompanied by a judicial imprimatur, of petitioner's mitigation evidence into a religion-driven factor in favor of the death penalty, is a major error, compounded by the California Supreme Court's failure to conduct a constitutionally adequate harmless error analysis. Two members of this Court were dissatisfied with the harmless error review of the California Supreme Court in People v. Pensinger, 52 Cal.3d 1210 (1991), describing it as "cursory" and "insufficient." (Pensinger v. California 116 L.Ed.2d 290, supra, [O'Connor, J., joined by Kennedy, J., dissenting from denial of certiorari, finding the California Supreme Court's "cursory review . . . clearly insufficient"].) In fact, the harmless error analysis in Pensinger was a paragon of propriety compared to that in this case, where the California Supreme Court took factors weighing in favor of reversal and turned them on their head to support the affirmance.

C. The Pervasive Abdication by the California Supreme Court of Its Responsibility to Provide Constitutionally Adequate Harmless Error Analysis

1. An historical perspective – "A Tale of Two Courts"

In 1989, Professor Gerald Uelmen, dean of Santa Clara University School of Law, reviewed the capital sentencing record of the California Supreme Court for the prior decade (Uelmen, "Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts," 23 Loyola L.A. L.Rev. 237 (1989)). Borrowing a metaphor from Charles Dickens,[4] Professor

[4] See Dickens, *A Tale of Two Cities*, chapter one (1859).

Uelmen contrasted the California Supreme Court's death judgment review from 1979 through 1986 with its record from 1987 through 1989, and found the disparity to be so dramatic as to suggest the existence of "two courts":

> "From 1979 through 1986, the Supreme Court of California reviewed sixty-four judgments of death. Five of them, or 7.8 percent, were affirmed. From 1987 through March of 1989, the Supreme Court of California reviewed seventy-one judgments of death. Fifty-one of them, or 71.8 percent, were affirmed. In two short years, the California affirmance rate for state Supreme Court review of death judgments moved from the third lowest in the United States to the eighth highest. The revolution which demarcates this dramatic shift was the retention election of November, 1986, in which the voters of California removed Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Renoso." (Id. at 237-238.)

Professor Uelmen included in his article a list of the affirmance rates in capital cases from 1977 through 1988 by all state supreme courts (id. at 297), which revealed that in 1986, the California Supreme Court turned on a dime from its historically low affirmance track and virtually overnight, in jurisprudential terms, positioned itself directly within the mainstream of capital sentencing review, right alongside the most experienced capital sentencing jurisdictions Georgia, Texas, and Florida.

The California Supreme Court under Chief Justice Malcolm Lucas established a 71.8 percent affirmance rate for the period 1986-1989. This track record, based on 71 decisions, ranked slightly lower than Georgia (73.1 percent affirmance rate based on 245 decisions), slightly above Texas (67.1 affirmance rate, based on 319 decisions), and above Florida (53.7 percent affirmance rate, based on 443 decisions) (Uelmen, op. cit., Table 1). Nationwide, the mainstream of capital appellate review

was bounded by affirmance rates ranging from 50 percent to 75 percent – the states accounting for 80 percent of all capital sentences reviewed fell within that range.

In sum, the California Supreme Court overnight catapulted itself into a capital affirmance rate falling well within the range staked out by the Supreme Courts of Georgia, Texas, and Florida, the states with the most capital decisions under their judicial belts and with the longest-lived capital sentencing statutes, having passed muster in the 1976 watershed decisions of this Court.[5]

Professor Uelmen viewed the striking turnabout in the California Supreme Court affirmance rate as indicative of a qualitative change in the capital decision-making process, a change so pronounced as to support his hypothesis that there were functionally two courts at work (Uelmen, op. cit., pp. 238-239). However, subsequent developments have revealed that the 1986-1989 California Supreme Court was to be distinctly short-lived.

2. The Third Court – the astronomical affirmance rate of the California Supreme Court since 1990

The California Supreme Court has subsequently undergone a second and equally instantaneous transformation, escalating its affirmance rate from a mainstream 71.8 percent for the years 1987 through 1989 to an astronomical 94.2 percent affirmance rate for the years 1990 through 1992. This affirmance rate outstripped that of every other capital sentencing jurisdiction in the country, as indicated by Professor Uelmen (op. cit., p. 297).

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[5] Proffit v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

The accompanying chart demonstrates that the capital affirmance rates in the more experienced courts of Georgia, Florida, and Texas have remained virtually unchanged from the mainstream record demonstrated through 1989. Indeed, for the years 1990-1992 cumulatively, the affirmance rate for the Supreme Court of Georgia was 70.3 percent; for Florida, 62.6 percent; and for Texas, 76.9 percent. (Uelmen, "How the Justices Stack Up," California Supreme Court Round-up, L.A. Daily Journal (June 4, 1993), p. 10.) The California Supreme Court's 95 percent affirmance rate for the same period must be viewed as astronomical.

CAPITAL AFFIRMANCE RATES
1990-1993*

California, Georgia, Texas, and Florida

State	Number of Death Judgments Affirmed	Number of Death Judgments Reversed	Affirmance Rate
California	86	5	**95.0%**
Georgia	19	8	70.3%
Florida	136	81	62.6%
Texas	60	18	76.9%

* This includes the five 1993 cases decided by the California Supreme Court as of June 1.

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3. The absence of functional explanations for the gross disparity in affirmance rates between California and other capital sentencing jurisdictions

Petitioner has considered whether the California Supreme Court's sudden surge to an unparalleled affirmance rate might be explained by hypotheses regarding penological or jurisprudential factors other than petitioner's claim of an unconstitutional abdication of responsibility in harmless error analysis. However, the apparent alternatives are implausible and untenable.

a. The California Paragon hypothesis

Petitioner first considered whether the trial courts, prosecutors, and defense counsel of California had somehow attained a state of near-superhuman perfection in their respective capital sentencing responsibilities, such that the California Supreme Court has been presented with virtually picture-perfect, error-free death judgments from 1990 through the present. The evidence is clearly to the contrary: A review of the California Supreme Court's decisions from 1990 to the present reveals that in only one of the death penalty affirmances was there found to be an error-free trial (People v. Deere, 53 Cal.3d 705 (1991) [affirmance after retrial, in which defendant did not contest guilt or penalty]). The California Supreme Court noted a total of more than 300 errors, distributed among the remaining 95 affirmances, but found these errors to be individually and cumulatively harmless.[6]

[6] Counsel for petitioner has reviewed all of the California Supreme Court decisions for 1990 and 1991, and most of the 1992-1993 decisions, to tabulate the number of errors therein

Indeed, many of the cases most recently affirmed in 1992 are remarkable for the sheer volume of errors recognized by the California Supreme Court. (See, e.g., People v. Hardy, 2 Cal.4th 86 (1992) [fifteen actual or assumed errors found harmless]; People v. Kelly, 1 Cal.4th 495 (1992) [fourteen actual or assumed errors deemed harmless]; People v. Mincey, 2 Cal.4th 408 (1992) [eight actual or assumed errors found harmless]; People v. Pinholster, 1 Cal.4th 865 (1992) [eight actual or assumed errors deemed harmless].)

Thus, it is simply not the case that the trial courts of California have somehow eradicated error from their proceedings to attain an unparalleled level of perfection unknown throughout the rest of the country. To the contrary, the California Supreme Court's own decisions show a steady rate of error, perhaps even particularly high during the past year.

Given the pervasive incidence of error in the California capital cases reviewed since 1990, petitioner considered a variation on the California Paragon hypothesis, i.e., whether California trial courts, prosecutors, and defense attorneys had somehow managed to confine their errors to petty peccadillos and venal sins of inconsequence, while their counterparts in Georgia, Florida, and Texas routinely committed gross gaffes, amounting to mortal sins fatal to the validity of the judgment. That hypothesis is both untenable on its face and belied by an

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identified. Petitioner in no way suggests that the California Supreme Court's determination of the existence or non-existence of errors is in any way exhaustive with respect to the ultimate adjudications in these cases. Petitioner views the California Supreme Court's acknowledgement of rampant errors as a baseline from which to evaluate its harmless error review.

examination of the nature of the errors in this and other cases. Indeed, the constitutional errors in this case – the prosecution's failure to disclose extensive benefits conferred on its star witnesses; the failure to correct the witnesses' false testimony denying such benefits; and defense counsel's total failure to investigate mitigating evidence – are manifestly of major magnitude in the hierarchy of constitutional infringements.

b. The Random Variation hypothesis

Petitioner has considered a final hypothesis, i.e., that the virtually instantaneous increase in the California affirmance rate and its gross disparity in comparison with other more experienced capital sentencing jurisdictions do not in fact reflect any quantum change in appellate review standard. Rather, petitioner entertains the hypothesis that the apparent alteration in appellate review reflects only a random variation in the court's caseload, suggesting nothing more remarkable than, say, a string of five straight "heads" results while flipping coins. Is it possible that the California Supreme Court has encountered an extended string of truly harmless error cases, a mere curiosity which could happen in any state at any given time pursuant to random factors?

To test this hypothesis, petitioner has employed the well-accepted chi-square test of statistical probability[7] to determine the likelihood that the observed disparities in capital sentencing rates might be simply the result of random factors,

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[7] See, e.g., Powers v. Ala. Dept. of Educ., 854 F.2d 1285, 1295-1298 (11th Cir. 1991); Lindsey v. Baxter Healthcare Corp., 757 F.Supp. 888 (N.D.Ill. 1991); Bridgeport Guardian Inc. v. County of Bridgeport, 735 F.Supp.1126 (D.Conn. 1990).

rather than the result of an identifiable, invidious influence. The application of the chi-square test reveals that there is less than a one-in-a-thousand chance that California's capital affirmance rate since 1990 diverges from that of Georgia because of random factors;[8] there is less than a one-in-a-thousand chance that California's affirmance rate since 1990 diverges from that of Florida because of random factors;[9] and less than a five-in-one-thousand chance that California's capital affirmance rate since 1990 diverges from that of Texas because of random factors.[10]

One is left with the conclusion that the disparity in affirmance rates is entirely due to the internal decision making of the California Supreme Court, rather than to extrinsic jurisprudential or penological factors, or to chance.

4. The resulting injustice

Appellate review by the court of last resort is a constitutional cornerstone for every capital sentencing jurisdiction. (Zant v. Stephens, 462 U.S. 862, 876 (1983); Pulley v. Harris, 465 U.S. 37, 53 (1984).) This Court has recently reemphasized that the state supreme court's review must meet federal constitutional standards to sustain a death sentence. (Clemons v. Mississippi, supra; Parker v. Dugger, supra, ___ U.S. ___, 112 L.Ed.2d 812.) The pervasive abdication by the

[8] The comparison with Georgia yields a chi-square figure of 11.54; $p < .001$.

[9] The comparison with Florida yields a chi-square figure of 30.09; $p < .001$.

[10] The comparison with Texas yields a chi-square figure of 10.10; $p < .005$.

California Supreme Court of its responsibilities renders both the death judgment in this case invalid and casts substantial suspicion over an entire category of capital affirmances by the court. Even the ever-so-rare reversal by the California Supreme Court since 1990 demonstrates defects in its harmless error review. In re Marquez, 1 Cal.3d 584 (1992) unanimously reversed a death sentence based on ineffective assistance of counsel in failing to investigate mitigating evidence (remarkably similar to this case), but affirmed the underlying murder and special circumstance convictions in spite of an equally strong demonstration of ineffective assistance of counsel. Dissenting as to the affirmance of the guilt verdict, Justice Kennard specifically lamented the misuse of the harmless error doctrine:

> "The majority does not dispute defense counsel's incompetence at trial; it finds his inadequacy harmless because of the strong evidence of guilt. But the doctrine of harmless error can only be taken so far. By holding that 17 alibi witnesses are insufficient to cast doubt on the legitimacy of the verdict, the majority stretches it past the breaking point." (1 Cal.4th at 610.)

Accompanying the California Supreme Court's decision in this case is the lengthy, exacting, penetrating, and pointed dissent of Justice Stanley Mosk, who candidly indicates that he is writing "for [his] federal colleagues," "regret[ting] that petitioner must turn to another forum to vindicate his federal constitutional rights" (id. at 617). Not only must petitioner turn to a federal forum for vindication of his rights, but so must the scores of other defendants prejudiced by the absence of meaningful appellate review in California. This Court clearly recognizes that "[f]ederal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the

capacity of the system to resolve primary disputes." (McCleskey v. Zant, ___ U.S. ___, 113 L.Ed. 2d 517, 543 (1991).) So long as the California Supreme Court defaults its appellate review responsibilities, the federal courts will have a significantly larger number of capital habeas cases to adjudicate. Not only has the California Supreme Court perpetuated an intolerable injustice in this cases, it has skewed the entire capital sentencing process in California and unfairly forced the responsibility for rectification downstream to the federal judiciary.

CONCLUSION

Wherefore, for the foregoing reasons, petitioner respectfully requests that this Court grant certiorari, and after full review, vacate petitioner's convictions and his death sentence.

DATED: June 9, 1993

Respectfully submitted,

Eric S. Multhaup
Attorney for Petitioner

jp-6/7/93-30

APPENDIX A

California Supreme Court Decision in
People v. Sandoval, 4 Cal.4th 155 (1992)

[No. S004765. Crim. No. 26405. Dec. 14, 1992.]

THE PEOPLE, Plaintiff and Respondent, v.
ALFRED ARTHUR SANDOVAL, Defendant and Appellant.

SUMMARY

Defendant was convicted of four counts of first degree murder (Pen. Code, § 187), with a multiple-murder special-circumstance finding (Pen. Code, § 190.2, subd. (a)(3)), and one count of attempted murder (Pen. Code, §§ 187, 664). The jury also found that defendant had personally used a firearm in the commission of each offense (Pen. Code, § 12022.5). Defendant had fatally shot two men and had wounded another man during a gang-related confrontation in a park, and had fatally shot a man and a woman in their home approximately two weeks later. The jury returned a verdict of death for the murder of the woman, and verdicts of life imprisonment without possibility of parole for the murders of the three men. (Superior Court of Los Angeles County, No. A760386, Richard P. Kalustian, Judge.)

The Supreme Court affirmed the judgment. As to guilt phase issues, the court held that the trial court did not err in denying defendant's motion to sever, in admitting evidence of defendant's gang affiliation, or in excluding evidence of the alleged culpability of third parties. The court also held that defendant's prior conviction of assault with intent to commit murder was properly admitted for impeachment, and that the trial court properly refused to rule, in advance of defendant's testimony, on his request to limit the scope of cross-examination. The court further held that the prosecutor did not commit misconduct in cross-examining a defense expert as to his bias and suggesting to the jury that the expert was a liar, but that the prosecutor did engage in nonprejudicial misconduct by denigrating defense counsel during closing argument.

As to the penalty phase, the court held that the prosecutor did not improperly cross-examine a defense witness concerning defendant's gang membership, and that the trial court did not err in refusing to give defendant's proposed instruction that age could be considered only as a mitigating factor. The prosecutor did not engage in misconduct, the court held, when he argued the effect of defendant's crimes on the victims and their families, but

did engage in nonprejudicial misconduct by paraphrasing a biblical passage in support of the death penalty. The court further held that the trial court did not abuse its discretion in refusing to declare a mistrial due to jury deadlock, or in requiring a separate penalty verdict as to each murder victim. (Opinion by Panelli, J., with Lucas, C. J., Kennard, Arabian, Baxter and George, JJ., concurring. Separate concurring and dissenting opinion by Mosk, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1) **Criminal Law § 202—Trial—Separate Trials on Different Counts—Severance Motion—Factors.**—When the requirements of Pen. Code, § 954 (severance of criminal charges), are satisfied, a defendant can predicate error on the trial court's refusal to sever charges only by making a clear showing that there is a substantial danger of prejudice requiring that the charges be separately tried. The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a severance motion. Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.

(2) **Criminal Law § 202—Trial—Separate Trials on Different Counts—Multiple Murder Charges Arising From Different Incidents.**—In a capital homicide prosecution involving four alleged murders committed on two different occasions, the trial court did not err in denying defendant's motion to sever (Pen. Code, § 954). The fact that the evidence concerning the two incidents may not have been cross-admissible was merely one factor suggesting possible prejudice, and while defendant alleged that the evidence concerning one incident was far weaker than that concerning the other, the prosecutor had represented to the trial court that there would be testimony at trial linking the two incidents and adding significantly to the strength of the weaker case. The inflammatory effect of evidence of defendant's gang membership

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as to one incident was neutralized by the fact that the victims were also gang members. Moreover, the fact that the two incidents were joined for trial, without more, was not the reason that the case was a capital one. Finally, while defendant may have desired to testify only as to one incident, he did not explain the nature of his testimony or why he wanted to give only limited testimony.

(3) **Criminal Law § 649—Appellate Review—Harmless and Reversible Error—Particular Errors—Trial—Denial of Severance Motion.**—When a criminal defendant, on an appeal following trial, raises an issue as to the trial court's denial of a motion to sever multiple charges for trial (Pen. Code, § 954), the reviewing court must consider whether, despite the correctness of the trial court's ruling, a gross unfairness has occurred from the joinder, so as to deprive the defendant of a fair trial or due process of law.

(4) **Homicide § 40—Evidence—Admissibility—Evidence of Gang Membership.**—In a capital homicide prosecution, the trial court did not err in admitting relevant evidence of defendant's gang affiliation, which established that defendant and the victims had been members of rival gangs. The fact that the gangs purportedly had been at peace for seven years did not eliminate gang retaliation as a motive for defendant's crimes. On the contrary, such retaliation appeared to have been the only plausible motive, in that the gang of which defendant had been a member had considered a certain park to be its territory, and defendant's victims, who had been members of a rival gang, had been shot in that park, without any other provocation.

[Admissibility of evidence of accused's membership in gang, note, 39 A.L.R.4th 775.]

(5a, 5b) **Homicide § 40—Evidence—Admissibility—Third Party Culpability.**—In a capital homicide prosecution, the trial court did not err in excluding, pursuant to Evid. Code, § 352 (trial court's discretion to exclude evidence), evidence of the alleged culpability of third parties, where, although the defense argued that one of the victims had been the center of a violent criminal operation and that any number of accomplices or rivals could have killed him, there was no evidence of another person's actual motive to commit the crimes. The defense had merely raised the possibility that others had such a motive, and while it did identify two persons with plausible motives, there was no evidence linking those persons to the actual perpetration of the crimes.

(6) **Criminal Law § 292—Evidence—Admissibility—Claims and Defenses of Accused—Third Party Culpability.**—A criminal defendant

has a right to present evidence of the alleged culpability of a third party if it is capable of raising a reasonable doubt about the defendant's own guilt. That rule, however, does not require that any evidence, however remote, must be admitted to show a third party's possible culpability. Evidence of another person's mere motive or opportunity to commit the crime, without more, will not suffice to raise a reasonable doubt about the defendant's guilt. Rather, there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.

(7) **Homicide § 58—Evidence—Admissibility—Documentary Evidence—Entire Writing to Explain Part.**—In a capital homicide prosecution in which defendant alleged that one of the victims had been the center of a violent criminal operation and that any number of accomplices or rivals could have killed him, the trial court properly excluded evidence consisting of an appointment book and weekly planners found in the victim's home, even though the prosecution had been permitted to introduce two slips of paper, bearing defendant's nickname and another name, which had been found clipped to the appointment book. Evid. Code, § 356, does provide that where part of an act, declaration, conversation, or writing is given in evidence, then any other act, declaration, conversation, or writing that is necessary to make it understood may also be given in evidence. The book and the weekly planners, however, were not part of a writing given in evidence by the prosecution, and were not necessary to an understanding of the slips of paper.

[See 1 Witkin, Cal. Evidence (3d ed. 1986) §§ 319-320.]

(8) **Criminal Law § 308—Evidence—Admissibility—Evidence of Other Crimes or Misconduct—Exceptions to Rule of Inadmissibility—Impeachment—Prior Conviction Involving Moral Turpitude.**—In a capital homicide prosecution, the trial court did not err in ruling that defendant's prior conviction of assault with intent to commit murder was admissible for impeachment purposes, where the trial court followed the proper analysis and properly concluded that defendant's prior conviction involved moral turpitude, and then exercised its discretion under Evid. Code, § 352, to conclude that the probative value of the evidence outweighed its prejudicial effect. The trial court did note that it could not assess the impact of the prior conviction on defendant's testimony because no offer of proof as to that testimony had been made. It did not, however, state that such an offer of proof was required. In fact, it noted that California law did not require such an offer of proof at the time. Moreover, due to the similarity of the prior

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and one of the charged crimes, the court offered to sanitize the prior by allowing reference to it only as a prior felony conviction. It did not abuse its discretion in doing so.

(9) **Criminal Law § 288—Evidence—Admissibility—Discretion of Trial Court—Proposition 8.**—The intention of the drafters of Prop. 8 was to restore the trial court's discretion as visualized by the Evidence Code and to reject the rigid, black letter rules of exclusion that had been grafted onto the Evidence Code by decisions of the California Supreme Court.

(10) **Criminal Law § 217—Trial—Course and Conduct of Trial—Cross-examination of Defendant—Trial Court's Refusal to Limit Scope.**—In a capital homicide prosecution involving four murders allegedly committed in two separate incidents, in which defense counsel indicated that defendant desired to testify concerning self-defense as to one incident, but not to testify at all concerning the other incident, defendant's right to testify on his own behalf was not violated when the trial court refused to rule, in advance of defendant's actual testimony, on his request to limit the scope of cross-examination to the incident about which he planned to testify. While defense counsel argued that the two incidents were entirely separate and that direct and cross-examination could be so limited, counsel gave no further details as an offer of proof. Moreover, the prosecutor argued that there was an evidentiary spillover between the two incidents. Thus, the trial court acted well within its discretion in denying defendant's request.

(11) **Criminal Law § 454—Argument and Conduct of Counsel—Prosecutor—Closing Argument—Comment on Witnesses—Calling Defense Expert Liar.**—In a capital homicide prosecution, the prosecutor did not engage in misconduct in cross-examining a defense forensic psychiatrist as to his interest in helping the defense, eliciting an admission that the expert had testified differently in other cases concerning the distinction between alcohol and PCP intoxication, and then arguing to the jury that the witness was a liar on the basis of that admission. The prosecutor was entitled to question the expert's testimonial consistency and possible bias, and referring to testimony as "lies" is an acceptable practice as long as the prosecutor argues inferences based on the evidence rather than personal belief. The prosecutor's argument met that requirement, and amounted to nothing more than vigorous, yet fair, argument. In any event, defendant waived any allegation of error as to the prosecutor's comment that the expert was a liar, since he failed to object to it during trial.

(12) **Criminal Law § 448—Argument and Conduct of Counsel—Prosecutor—Examination of Witnesses—Cross-examination of Defense Alibi Witness—Concerning Defense Counsel's Assistance in Fabricating Testimony.**—In a capital homicide prosecution involving two alleged sets of murders, the prosecutor did not improperly suggest that defense counsel had colluded with an alibi witness in fabricating his testimony, where the witness contended he and defendant had traveled together to a ranch in Mexico before the second set of murders and that defendant was there at all crucial times, and the prosecutor, noting that the witness's arrest near the border on the day he supposedly went to Mexico had not been revealed during direct examination, asked the witness if defense counsel had tried to avoid the subject. Similarly, it was not improper for the prosecutor to ask the witness if defense counsel had explained to him that it was necessary to state that defendant had been in Mexico on a certain day, and that the witness would be liable as an accessory after the fact if he admitted that he knew defendant had committed an earlier set of murders at the time they supposedly went to Mexico. In any event, defendant waived the point for purposes of appeal by failing to object at trial and request a timely admonition.

(13) **Criminal Law § 559—Appellate Review—Presenting and Reserving Objections—Argument and Conduct of Prosecutor—Expressing Personal Disbelief in Testimony of Defense Alibi Witness.**—In a capital homicide prosecution, defendant waived his contention on appeal that the prosecutor committed misconduct on cross-examination of a defense alibi witness by asking the witness when he was going to stop lying, thereby expressing the prosecutor's own personal disbelief in the witness's testimony, where defendant failed to object to the prosecutor's question, and any harm could have been cured by a prompt admonition.

(14) **Criminal Law § 448—Argument and Conduct of Counsel—Prosecutor—Examination of Witnesses—Cross-examination of Defense Alibi Witness—Improper Impeachment With Prior Drug Arrest.**—In a capital homicide prosecution, defendant was not prejudiced by the prosecutor's allegedly improper attempt to impeach an alibi witness with evidence of a drug arrest, where the prosecutor, in questioning the witness as to his arrest as an accessory to murder in the present case, queried, "You were also arrested for something else, weren't you?", and where defense counsel's objection to the question was sustained, although no admonition was requested or given. The jury was already aware that the witness had been arrested for possession of methamphetamines, and the jury was given the standard instruction stating that a

question was not evidence and that when an objection to a question was sustained, the jurors should not guess what the answer might have been (CALJIC No. 1.02).

(15) **Criminal Law § 448—Argument and Conduct of Counsel—Prosecutor—Examination of Witnesses—Cross-examination of Defense Alibi Witness—Questioning Witness on Failure to Offer Exculpatory Information.**—In a capital homicide prosecution, defendant could not have suffered any significant prejudice from alleged misconduct that occurred when the prosecutor cross-examined an alibi witness about his failure to volunteer his exculpatory information to the police prior to trial. Although defendant contended that the prosecutor knew that the witness had been arrested in the present case as an accessory to murder and had invoked his right to remain silent, the witness himself explained that that he had never told the police about the alibi because he had refused to be interviewed, and further stated on redirect examination that he had given the exculpatory information to the defense attorneys and their investigators a year before the trial.

(16) **Criminal Law § 448—Argument and Conduct of Counsel—Prosecutor—Examination of Witnesses—Cross-examination of Defense Alibi Witness—Concerning Conversation Outside Courtroom.**—In a capital homicide prosecution, there was no basis for branding, as being in bad faith, the prosecutor's questioning regarding a conversation between the prosecutor, defense counsel, and an alibi witness that occurred in an elevator after the witness had given his testimony on direct examination. The record showed only that on the morning after the conversation occurred, defense counsel reopened direct examination, questioning the witness about the conversation, and the witness testified that the prosecutor had threatened him by stating that someone behind the crimes was going to jail. The prosecutor then asked the witness whether the alleged threat had been in response to defense counsel's question, "Well, how do you guys like what happened in there today?" Defense counsel's objection to the question was overruled, and the witness stated that he only heard defense counsel say, "what's up?" None of the police officers who overheard the conversation were called as witnesses by either side.

(17a, 17b) **Criminal Law § 451—Argument and Conduct of Counsel—Closing Argument—Denigration of Defense Counsel—Accusing Defense Counsel of Misleading Jurors and Perpetrating Fraud on Court.**—In a capital homicide prosecution, although the prosecutor was entitled to argue the inconsistencies in the evidence and even to

characterize inconsistent testimony as "lies," it was improper to denigrate defense counsel rather than the evidence by referring to defense counsel's supposed attempts to mislead the jury and by accusing defense counsel of perpetrating a fraud on the court. Such personal attacks on opposing counsel are improper and irrelevant to the issues. The prosecutor's references to counsel's reaction to particular testimony was also improper, for the same reason. The remarks, however, were a small part of the prosecutor's very lengthy review of the evidence, and were clearly recognizable as an advocate's hyperbole. Thus, there was no reasonable probability that the jury would have reached a more favorable result absent the objectionable comments.

[See **Cal.Jur.3d (Rev)**, Criminal Law, § 2954; 5 **Witkin & Epstein**, Cal. Criminal Law (2d ed. 1989) § 2914.]

(18) **Criminal Law § 451—Argument and Conduct of Counsel—Closing Argument—Denigration of Defense Counsel—Expressing Personal Opinion on Defendant's Guilt.**—A prosecutor may vigorously argue his or her case, marshalling the facts and arguing inferences to be drawn therefrom. The prosecutor may not, however, express a personal belief in the defendant's guilt, in part because of the danger that jurors may assume that there is other evidence in the prosecutor's command on which that conclusion is based. It is also improper for the prosecutor to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case. It is not necessary to find that such an implication impinges upon the defendant's constitutional right to counsel. Instead, it is sufficient to note that the defendant's conviction should rest on the evidence, not on the derelictions of his or her counsel. Casting uncalled-for aspersions on defense counsel directs attention to largely irrelevant matters and does not constitute comment on the evidence or argument as to inferences to be drawn therefrom.

(19) **Criminal Law § 559—Appellate Review—Presenting and Reserving Objections—Argument and Conduct of Prosecutor—Expressing Personal Opinion on Defense Case.**—In a capital homicide prosecution, in which defendant claimed that the prosecutor engaged in three instances of misconduct in the form of improperly expressing a personal opinion regarding the defense case, defendant waived, for purposes of appeal, his argument with respect to two of the instances, having failed to raise timely objections to the comments at trial. As to the third instance, the prosecutor's statement that he shook his head in disbelief every time he thought about one defense witness's testimony

was made in the context of reviewing the discrepancies in defense testimony, and it was not likely that the jury would have understood it as being based on anything outside the record.

(20) **Criminal Law § 455—Argument and Conduct of Counsel—Prosecutor—Closing Argument—Comment on Defendant's Failure to Testify.**—In a capital homicide prosecution, the prosecutor did not engage in prejudicial misconduct during closing argument by referring to defendant's failure to testify at trial, where the prosecutor stated that he had forestalled defense testimony by preemptively proving that defendant had not needed glasses at the time of the killings, and that if that fact had not been proven, the jury would have heard defendant claim that he shot at the victims during a fight in the park because he was not wearing his glasses at the time and could not see well. The trial court sustained defense counsel's objection and admonished the jury to disregard the comments to the extent they reflected on defendant's failure to testify. While the trial court overruled defendant's later objection to similar comments by the prosecutor during rebuttal, the earlier admonition was sufficient to cover these comments, which were clearly harmless, having been a minor feature in the prosecutor's lengthy argument.

(21) **Criminal Law § 451—Argument and Conduct of Counsel—Prosecutor—Closing Argument—Referring to Defendant's Neat Appearance in Court as Ploy.**—In a capital homicide prosecution, in which defendant contended he had shot at certain victims because he had not been wearing his eyeglasses at the time of the killings, and defendant had worn a suit and reading glasses and had been clean-shaven during trial, defendant waived his claim on appeal that the prosecutor engaged in misconduct by referring to the defendant's courtroom appearance as a "ploy" and by asserting that defendant did not need to wear the glasses at all times during the trial. Defendant failed to object to the comments, and any error could have been cured by a timely admonition. In any event, the statements could not have had a prejudicial effect in light of the overwhelming evidence of the killings.

(22) **Criminal Law § 520—Judgment, Sentence, and Punishment—Penalty Trial—Prosecutorial Misconduct—Cross-examination of Defense Expert Concerning Defendant's Gang Membership.**—In the penalty phase of a capital homicide prosecution, the prosecutor did not engage in any misconduct in cross-examining a gang consultant who had been called by defendant to rebut evidence of defendant's

gang affiliation that had been properly admitted in the guilt phase. The witness had testified that the gang to which defendant had belonged had been reformulated into a neighborhood association with the goal of keeping the peace, that defendant had not been involved in gang activities since before the murders occurred, and that he was working to keep other young people out of gangs. The prosecutor was entitled to attempt to negate that evidence by asking the witness if it was true that the gang to which defendant belonged was one of the most violent gangs in its area and was responsible for most of the murders in that area in a 10-year period, including the year the present murders were committed, and whether defendant had been one of the gang's most active members.

(23) **Criminal Law § 448—Argument and Conduct of Counsel—Prosecutor—Examination of Witnesses—Defense Reputation Witness—Cross-examination Concerning Defendant's Bad Acts—Good Faith Requirement.**—The prosecution may inquire of a defense reputation witness whether the witness has heard of an act or conduct by the defendant that is inconsistent with the witness's testimony, as long as the People have a good faith belief that the act or conduct about which they wish to inquire actually took place.

(24) **Criminal Law § 523—Judgment, Sentence, and Punishment—Penalty Trial—Instructions—Age as Aggravating or Mitigating Factor.**—In the penalty phase of a capital homicide prosecution, the trial court did not err in refusing to give defendant's proposed special instruction that his age at the time of the crimes could be considered only as a mitigating factor, and instead giving CALJIC No. 8.84.1, which simply states that the jury may consider the age of the defendant at the time of the crime in determining the appropriate penalty. Mere chronological age should not, in and of itself, be deemed either aggravating or mitigating. The word "age" in the statutory sentencing factor is used as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Thus, either counsel may argue any such age-related inference in every case. Similarly, it was not improper for the prosecutor to argue that it was an aggravating factor that defendant, who was 26 years old at the time of the crimes, was only enough to know the difference between right and wrong.

(25) **Criminal Law § 522—Judgment, Sentence, and Punishment—Penalty Trial—Argument—Impact of Crime on Victim's Family.**—The injury inflicted by a capital defendant, including evidence about

the victim and the impact of the crime on the victim's family, is one of the circumstances of the crime, evidence of which is admissible under Pen. Code, § 190.3, factor (a). Thus, in the penalty phase of a capital homicide prosecution, in which defendant had introduced a photograph showing him as a young boy at his father's funeral in order to illustrate his difficult childhood, the prosecutor did not engage in misconduct by telling the jurors that when they looked at the photograph, they should think of the funerals of defendant's victims, and that they should think of the victims' parents and families.

(26a, 26b) **Criminal Law § 522—Judgment, Sentence, and Punishment—Penalty Trial—Argument—Invoking Biblical Passage as Support for Death Penalty.**—In the penalty phase of a capital homicide prosecution, the prosecutor engaged in misconduct during rebuttal argument by paraphrasing a Biblical passage commonly understood as providing justification for the death penalty, where the prosecutor's comments were not fairly responsive to defense counsel's closing argument. While a prosecutor may refer to matters that are not in evidence if they are common knowledge or are illustrations drawn from common experience, history, or literature, he or she may not invoke higher or other law as a consideration in the jury's sentencing determination. Nevertheless, the prosecutor's misconduct was not prejudicial, since the jurors deliberated for four days before indicating they were split on all four murder counts, then deliberated another day before returning verdicts of life without possibility of parole on three counts and a death penalty verdict on only one count. Under such circumstances, there was no reasonable possibility that the jury would have reached more favorable verdicts had the misconduct not occurred.

(27) **Criminal Law § 522—Judgment, Sentence, and Punishment—Penalty Trial—Argument—Invoking Biblical Passage as Support for Death Penalty—Extent of Permissible Argument.**—Penalty determinations are to be based on the evidence presented by the parties and the legal instructions given by the court. Reference by either party to religious doctrine, commandments, or biblical passages tending to undermine that principle is improper. While the defense in a capital penalty trial must be allowed some latitude in its presentation of mitigating evidence, that latitude does not include exhortation of religious canons as a factor weighing against the death penalty. Were the defense to present such an argument, it would be subject to objection by the prosecution and possible like-kind argument in rebuttal. What is objectionable is reliance on religious authority as supporting or opposing the death penalty. All reference to religion or religious figures is not ruled out as long as the reference does not purport to be a religious law or commandment.

(28) **Criminal Law § 261—Trial—Verdict—Rendition—Jury Deadlock—Trial Court's Discretion to Require Further Deliberation.**—The determination of whether there is a reasonable probability that a jury can reach an agreement on a verdict, so as to warrant further deliberation, rests in the discretion of the trial court. The court must exercise its power, however, without coercing the jury, so as to avoid displacing the jury's independent judgment in favor of considerations of compromise and expediency. The question of coercion necessarily depends on the facts and circumstances of each case.

(29) **Homicide § 98—Verdict, Sentence, and Punishment—Verdict—Jury Deadlock—Trial Court's Discretion to Require Further Deliberation.**—In the penalty phase of a capital homicide prosecution, the trial court did not abuse its discretion in refusing to declare a mistrial under Pen. Code, § 1140 (no reasonable probability of agreement on verdict), even though the jury had deliberated fourteen and one-half hours before indicating that it was split on each of the four murder counts, and a poll of the jury revealed that no juror felt it was reasonably possible that an agreement could be reached. Given that the trial had lasted five months, it was not unreasonable to request that the jury spend a little more time deliberating. Moreover, the fact the order to continue deliberating was unaccompanied by further instructions, and the following day the jury reached verdicts of life imprisonment without possibility of parole on three counts and a death sentence on the fourth count did not suggest that the trial court coerced the jury or that the verdicts resulted from compromise and expediency. The jury may have felt that only one death verdict was necessary, and that the one murder on which it did return a death verdict was the most egregious, since the victim had no involvement with defendant.

(30) **Homicide § 98—Verdict, Sentence, and Punishment—Verdict—Multiple Murders—Requiring Separate Verdict as to Each Murder Victim.**—In the penalty phase of a capital homicide prosecution, the trial court did not err in requiring the jury to return a separate penalty verdict as to each murder victim. A defendant who kills more than one person may be convicted and punished for each murder. The multiple verdicts did not obscure the overriding constitutional value of reaching a comprehensive determination of the appropriateness of the death penalty considering all aggravating and mitigating evidence, nor did they invite compromise verdicts, or place undue emphasis on the characteristics and status of each individual victim.

(31) **Criminal Law § 523—Judgment, Sentence, and Punishment—Penalty Trial—Instructions—Imposition of Death Penalty Where Aggravating Factors Outweigh Mitigating Factors.**—In the penalty phase of a capital homicide prosecution, the trial court did not err in giving CALJIC No. 8.84.2, which states that in order to impose the death penalty the jury must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors that they warrant death instead of life in prison without possibility of parole. While that instruction did not specifically state that the jury was required to find that the aggravating factors outweighed the mitigating factors, the court gave a further instruction that the weighing of the aggravating and mitigating factors was not a mere mechanical counting of factors, that the jury was free to assign whatever moral or sympathetic value it deemed appropriate to each factor, and that it was to consider the totality of aggravating factors with the totality of the mitigating factors. These instructions, taken together, were sufficient to inform the jury that it could return a death verdict only if the aggravating circumstances outweighed the mitigating circumstances.

COUNSEL

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OPINION

PANELLI, J.—Defendant was convicted by a jury in the Los Angeles County Superior Court of four counts of first degree murder (Pen. Code, §

187)[1] with a multiple-murder special-circumstance finding (§ 190.2, subd. (a)(3)), and one count of attempted murder (§§ 664/187). The jury also found that defendant personally used a firearm in the commission of each offense (§ 12022.5).

The jury returned a verdict of death as to the conviction of murder of Marlene Wells and verdicts of life without possibility of parole as to the convictions of murder of Gilbert Martinez, Anthony Aceves, and Ray Wells. The appeal is automatic. (§ 1239, subd. (b).)

GUILT PHASE FACTS

Prosecution Case

1. *Belvedere Park Murders.*

About 2:30 a.m. on October 14, 1984, Adela Rodriguez and a group of girls (Zebba, Susie, Dianne, Corine, and Yvonne), along with Gilbert Martinez and Manuel Torres, drove to Belvedere Park in East Los Angeles. Anthony Aceves and a man named Jack drove to the park in another car. Once there, the group broke up into couples. Adela walked off with Gilbert Martinez.

Adela and Gilbert started walking back to the car after Zebba called for them to return. A fight was about to start near the car between people Adela did not know. As Adela was getting in the car, Gilbert said, "Let me get my friends first." As Gilbert approached his friends, Adela saw defendant shoot Gilbert in the head at close range. Defendant also shot Anthony in the head, and he shot at Manuel as the latter ran away. Defendant turned and pointed the gun at Adela and her friend Susie. Susie backed the car out, and drove off. Defendant's car followed them for a short distance. The girls then returned to the park to check on their friends. Gilbert died in Adela's arms.

Susie Martinez testified that she drove Adela and the others to Belvedere Park on October 14, 1984. She walked around the park with Anthony Aceves until they were called back to the car. When they arrived at the car, she saw Carlos Tostado fighting with someone. The fight stopped, and she noticed defendant standing next to a brown Monte Carlo arguing or talking with Anthony. Gilbert was nearby. Defendant pulled out a gun and shot Gilbert and Anthony in the head. After Gilbert fell to the ground, defendant shot him again. Susie did not see Gilbert or Anthony with any weapons, nor did she them make any aggressive gestures.

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[1]All statutory references hereafter are to the Penal Code unless otherwise indicated.

Carlos Tostado testified that he drove a white Monte Carlo to Belvedere Park on October 14, 1984. Several friends were with him. Another car drove up with four young women and three men. Tostado fought with one of the men. As the fight was breaking up, defendant, also known as "Chato," and Eugene Valenzuela, also known as "Pelon," drove up in a tan Monte Carlo. Defendant got out of the car, grabbed one of the men by the neck and shot him. Tostado had known defendant for about 10 years and was a member of the same gang, Arizona Marivilla. The victims belonged to a different gang, Mariana Marivilla.

Tostado admitted that he had lied to the police when he gave them statements on October 14, October 16, and December 12, 1984. He acknowledged that he was on probation for using phencyclidine (PCP) at the time of his testimony.

The prosecution read the preliminary hearing testimony of Manuel Torres, who had since died in an unrelated auto accident. He had gone to Belvedere Park in Susie's car with Gilbert Martinez and several young women. As they were getting into the car to leave, Gilbert stopped to talk to a group of people. Anthony Aceves left the car to "back up" Gilbert. Torres heard shots and saw Anthony fall to the ground. He himself was shot in the neck, but he did not see who shot him.

Deputy Sheriff Woodrow West went to Belvedere Park around 4 a.m. to investigate the shootings. He found a small pocket knife on the ground near the spot where Anthony Aceves had fallen. There were traces of blood on the knife. Deputy West also found five expended .22-caliber bullet casings.

Autopsies performed on the bodies of Gilbert Martinez and Anthony Aceves revealed that both alcohol (.09 percent) and PCP (.033 micrograms per milliliter) were found in Martinez's blood and that PCP (.042 micrograms per milliliter) was detected in Aceves's liver tissue. Since Aceves died three days after the shooting, the PCP levels in his liver and blood would have been higher at the time of the shooting.

2. *Wells Murders.*

Benjamin Verduzco had known defendant for about 16 years and had been a fellow member of Arizona Marivilla, but Verduzco no longer belonged. He agreed to testify in exchange for release from prison. He was placed in a protection program, given $600 a month for room and board, and was promised a name change.

On October 15 or 16, 1984, defendant asked Verduzco to keep a beige and brown Monte Carlo in his garage because he was in some kind of trouble.

Verduzco agreed. Defendant left the car in Verduzco's garage and drove off with Eugene Valenzuela in a 1969 black Chevrolet Impala.

A week later, on October 24, 1984, defendant came to Verduzco's home. Ray and Marlene Wells arrived a few minutes later. Defendant asked to borrow $5 from Ray Wells and then left. That night, the police came to Verduzco's house and seized defendant's car.

On October 31, 1984, at 12:42 a.m., Frank Bender heard gunshots. He went to the front door of his house and looked across the street to the residence of Ray and Marlene Wells. He noticed that the Wellses' dog appeared frightened. He also saw a black 1968 Chevrolet Caprice parked nearby with the engine running.[2] Shortly thereafter, he saw a silhouette cross the Wells yard and drive away in the car.

That same night, between 1 and 2 a.m., defendant called Benjamin Verduzco and said, "Bennie, I just did the big mouth in." When Verduzco asked, "Who," defendant said, "Remember the one who was there in the morning with the car." He referred to him as "R" and did not use a name. Defendant also said, "You know I take care of business. I had to do her, too." Defendant killed "her" because she saw him "do R." Defendant said, "They have gone to heaven with the angels." Defendant said he did it so that "they wouldn't be snitching no more."

Deputy Sheriff Robert Havercroft went to the Wells residence on the night of the murders. The rear door of the house was closed but not locked. He found Ray Wells's body on a couch in the living room and Marlene's body in the doorway between the dining room and kitchen. Deputy Havercroft found no evidence of theft, and no signs of forced entry.

Deputy Havercroft found three appointment books with many names and addresses. Attached to one of the appointment books were two small pieces of paper. The names "Chato" and "Pelon" were written on one piece of paper, and the name "Moses Verduzco" was written on the other.

Betty Phipps sold a 1968 Chevrolet Caprice to defendant in October 1984. The car was not in running condition; defendant told her he was going to fix it up. On October 7, 1984, a black 1968 Chevrolet Caprice was stolen from the Los Angeles zoo. The stolen 1968 Chevrolet Caprice was stopped at the

[2]Bender, who is a car buff, first told police it was a Chevrolet Impala. He determined it was a Chevrolet Caprice after examining a book of cars. The only difference between an Impala and a Caprice was that the Caprice had chrome strips. He remembered the car because it was in excellent shape.

United States-Mexico border at Tecate on December 15, 1984, while Salvador Rubio, a member of the Arizona Marivilla gang, was driving it. The license plate and vehicle identification numbers that were on the car did not belong to the car. One of the documents found in the glove compartment was a "pink slip" or ownership certificate with the name of Betty Phipps on the back.

Defense Case

1. *Belvedere Park Murders.*

The defense presented evidence from law enforcement officers and others regarding inconsistent statements given by Adela Rodriguez and the other young women on the night of the shootings. Zebba Rodriguez testified that when she was walking back to the car she saw Gilbert Martinez, Anthony Aceves, and Manuel Torres arguing with about three other men. She was afraid, got in the car, heard shots, and ducked until she heard no more shots. When she raised her head, she saw Gilbert and Anthony lying on the ground. She did not see who had done the shooting.

David Martinez testified that he went to Belvedere Park on the night of the shooting with Carlos Tostado. He and Tostado had spent the day cruising, drinking beer and smoking PCP.

Dr. Griffith Thomas, a pathologist, testified that PCP can cause very bizarre and aggressive behavior. The amount of PCP in the victims' bodies would correlate with bizarre behavior. Dr. Donald Trockman, a forensic psychiatrist, testified that persons with amounts of PCP in their systems such as the victims showed were "unpredictable people" and that they "may attack you and try to kill you."

2. *Wells Murders.*

Detective Gene Hetzel interviewed Benjamin Verduzco on November 1, 1984. When he told Verduzco that the Wellses had been murdered, Verduzco appeared surprised and shocked. Verduzco did not mention that he had received a phone call from defendant on the night of the murders. He did not tell police about the phone call until much later.

Ralph Ortega testified that he went to a ranch in Tecate, Mexico with defendant and several other people on October 24, 1984. Ortega went back to Los Angeles and returned to Tecate with his wife and children on October 30, 1984. Defendant was still there. The next evening, October 31, Halloween, defendant and some others took Ortega's son trick-or-treating.

GUILT PHASE CONTENTIONS

1. *Denial of Motion to Sever Counts.*

Defendant contends that the trial court erred in denying his motion to sever the Belvedere Park murders from the Wells murders. He argued for severance on the basis that the incidents were unrelated, not cross-admissible, and that the evidence in the Wells charges was far weaker than that in the Belvedere Park charges. The court denied severance based on the prosecutor's representation that Benjamin Verduzco would testify at trial and provide evidence of defendant's motive and premeditation concerning the Wells murders that linked them with the Belvedere Park murders.

Defendant renewed his motion to sever shortly before trial was scheduled to begin. The trial court denied the motion, again in reliance on the prosecutor's representation about Verduzco's anticipated testimony.

Section 954 provides in pertinent part: "An accusatory pleading may charge two or more different offenses . . . of the same class of crimes or offenses, under separate counts . . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. . . ."

The statutory requirements for joinder were met here because both incidents involved the same class of crimes—murder. (1) Since the requirements for joinder were satisfied, defendant can predicate error only on a clear showing of potential prejudice. (*People* v. *Johnson* (1988) 47 Cal.3d 576, 587 [253 Cal.Rptr. 710, 764 P.2d 1087].) "The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*People* v. *Bean* (1988) 46 Cal.3d 919, 938 [251 Cal.Rptr. 467, 760 P.2d 996].)

"The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial." (*Frank* v. *Superior Court* (1989) 48 Cal.3d 632, 639 [257 Cal.Rptr. 550, 770 P.2d 1119].) Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate

evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns it into a capital case. (*Ibid.*; see also *Williams* v. *Superior Court* (1984) 36 Cal.3d 441, 453 [204 Cal.Rptr. 700, 683 P.2d 699].)

(2) Defendant bases his argument for prejudice primarily on the absence of cross-admissibility of the two sets of offenses. He argues that the trial court's reasoning did not establish that the evidence of the two separate incidents would have been admissible in its entirety had there been separate trials. According to defendant, all it established was that there would have been some minor evidentiary crossover as to the two incidents. However, even if defendant is correct on this point, it is now clear that cross-admissibility is not the sine qua non of joint trials. (*People* v. *Mason* (1991) 52 Cal.3d 909, 934 [277 Cal.Rptr. 166, 802 P.2d 950]; *Frank* v. *Superior Court*, *supra*, 48 Cal.3d at p. 641; *People* v. *Poggi* (1988) 45 Cal.3d 306, 321 [246 Cal.Rptr. 886, 753 P.2d 1082].) "While we have held that cross-admissibility ordinarily dispels any inference of prejudice, we have never held that the absence of cross-admissibility, by itself, sufficed to demonstrate prejudice." (*People* v. *Mason*, *supra*, 52 Cal.3d at p. 934.) "That the evidence would otherwise be inadmissible may be considered as a factor suggesting possible prejudice, but countervailing considerations that are not present when evidence of uncharged offenses is offered must be weighed in ruling on a severance motion. The burden is on the defendant therefore to persuade the court that these countervailing considerations are outweighed by a substantial danger of undue prejudice." (*People* v. *Bean*, *supra*, 46 Cal.3d at p. 939.)

Defendant did not carry that burden. The potential prejudice he asserted did not rise to the level of demonstrating that the court's denial of severance was an abuse of discretion. The court recognized that the anticipated testimony by Verduzco added significantly to the strength of the Wells case, thereby obviating the danger of a "spillover" effect from the Belvedere Park evidence. Indeed, the court suggested that it would reconsider the severance motion if the prosecution were not able to secure Verduzco's testimony. The inflammatory effect of defendant's gang membership as to the Belvedere Park case was neutralized by the fact that the victims were also gang members. Moreover, this was not a case in which capital charges resulted solely from the joinder of the two incidents. (Cf. *Williams* v. *Superior Court*, *supra*, 36 Cal.3d at p. 454.)

Defendant also made passing reference to the fact that he had separate defenses that would be prejudiced because he desired to testify as to one

incident but not the other. Although we have not addressed this theory of prejudice, it has been considered by federal courts. The federal courts have ruled that severance is not mandatory every time a defendant wishes to testify to one charge but not to another. " 'If that were the law, a court would be divested of all control over the matter of severance and the choice would be entrusted to the defendant.' " (*U.S.* v. *Archer* (7th Cir. 1988) 843 F.2d 1019, 1022.) The need for severance does not arise in federal courts " 'until the defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other.' " (*Ibid.*; quoting *Baker* v. *United States* (D.C. Cir. (1968) 401 F.2d 958, 977 [131 App.D.C. 7]; see also *United States* v. *Valentine* (10th Cir. 1983) 706 F.2d 282, 291.) Federal courts have required the defendant to present enough information to satisfy the court that the claim of prejudice is genuine and to enable it to weigh the considerations of economy and expedient judicial administration against the defendant's interest in having a free choice with respect to testifying. (*United States* v. *Valentine*, *supra*, 706 F.2d at p. 291.)

Defendant's showing fell far short of anything that would have satisfied the federal standards or any standard this court might adopt. Defendant neither explained the nature of the testimony he wished to give in the Belvedere Park case nor his reasons for not wanting to testify in the Wells case. The trial court did not abuse its discretion in denying severance.

(3) Because the issue is raised on appeal following trial, we must also consider whether, "despite the correctness of the trial court's ruling, a gross unfairness has occurred from the joinder such as to deprive the defendant of a fair trial or due process of law." (*People* v. *Johnson*, *supra*, 47 Cal.3d at p. 590.) Defendant claims gross unfairness occurred as a result of the destruction of his ability to testify as to one incident but not as to the other. He has done no more, however, than make a bald assertion to that effect. "One asserting prejudice has the burden of proving it; a bald assertion of prejudice is not sufficient." (*Id.* at p. 591.) We conclude, therefore, that defendant has failed to show that denial of severance deprived him of a fair trial.

2. *Use of Peremptory Challenges.*

Defendant contends that the trial court erred in permitting the prosecutor to systematically exercise his peremptory challenges to excuse from the jury those prospective jurors who had expressed some scruples about imposition of the death penalty. Defendant acknowledges that we have addressed this contention on numerous occasions and have found no constitutional infirmity in permitting peremptory challenges by both sides on the basis of

specific juror attitudes on the death penalty. (See, e.g., *People* v. *Caro* (1988) 46 Cal.3d 1035, 1061 [251 Cal.Rptr. 757, 761 P.2d 680]; *People* v. *Belmontes* (1988) 45 Cal.3d 744, 799 [248 Cal.Rptr. 126, 755 P.2d 310].) Accordingly, we reject defendant's contention.

3. *Evidence of Defendant's Gang Membership.*

Defendant contends that the trial court erred in admitting evidence of his gang membership because it was irrelevant and prejudicial to his defense. Defendant objected pretrial by moving to preclude the prosecutor from referring to his alleged gang membership during opening statements. The prosecutor argued that evidence of gang membership was relevant to prove the motive for the murders at Belvedere Park. The trial court ruled that the prosecutor had made a showing that the evidence was admissible and denied the motion.

Defendant later moved to strike the testimony of Carlos Tostado and Benjamin Verduzco on the ground that the prosecutor had used them to put irrelevant and prejudicial testimony before the jury of defendant's alleged gang membership. The trial court denied the motion, ruling that the gang membership evidence had not caused undue prejudice.

(4) Defendant argues that the evidence of gang member ship was irrelevant and that the prosecutor never proved a gang-related motive for the shootings. We do not agree. The evidence established that the victims were members of a rival gang. The fact that the gangs purportedly had been at peace for seven years does not eliminate gang retaliation as a motive. Indeed, that appears to have been the only plausible motive. What we have here is a battle over turf. The Arizona Marivilla gang considered Belvedere Park to be its territory. The victims, members of a rival gang, were in Arizona Marivilla territory and were shot by a member of the Arizona gang without any other provocation.

Defendant argues that evidence of gang membership was found to be prejudicial and irrelevant in *People* v. *Cardenas* (1982) 31 Cal.3d 897 [184 Cal.Rptr. 165, 647 P.2d 569] and *People* v. *Perez* (1981) 114 Cal.App.3d 470 [170 Cal.Rptr. 619]. However, here, unlike *Cardenas* and *Perez*, the evidence was far more relevant. In *Cardenas* the prosecution introduced evidence of gang membership to prove bias of defense witnesses, but bias had already been established by other testimony. We held that the admission of gang membership evidence was an abuse of discretion under Evidence Code section 352 because the evidence was of minimal probative value, cumulative, and extremely prejudicial. In *Perez*, the evidence of gang membership had no relevance to any issue at trial. In this case, the court did not err in the admission of gang affiliation.

4. *Exclusion of Evidence of Third Party Culpability.*

(5a) Defendant contends that the trial court improperly excluded, pursuant to Evidence Code section 352, evidence of third party culpability as to the Wells murders. We find no abuse of the court's discretion to exclude such evidence.

Deputy Havercroft found a daily appointment book and two weekly planners at the Wells residence. The books contained many names and addresses. Two small pieces of paper were clipped to the daily appointment book. The names "Chato" and "Pelon" were written on one piece of paper, and the name "Moses Verduzco" was written on the other piece of paper. Defendant's nickname is "Chato."

The defense sought to prove that Ray Wells was the center of a violent criminal operation involving drugs and stolen cars and guns, and that any number of criminal accomplices or rivals could have killed him. Therefore, the defense sought to cross-examine Deputy Havercroft about the names found in the appointment book and weekly planners and to introduce those documents into evidence. After considerable argument and an offer of proof, the court ruled that the evidence was inadmissible because "it still does not point the finger at any individual nor does it rise at all above possible ground of suspicion."

(6) A criminal defendant has a right to present evidence of third party culpability if it is capable of raising a reasonable doubt about his own guilt. This rule does "not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People* v. *Hall* (1986) 41 Cal.3d 826, 833 [226 Cal.Rptr. 112, 718 P.2d 99].)

(5b) The trial court properly found defendant's showing insufficient. The defense had no evidence of another person's actual motive to commit the crimes. Instead, the defense merely raised the possibility that others had a motive to kill Ray and Marlene Wells. Although the defense identified two persons with plausible motives, they had no direct or circumstantial evidence linking them to actual perpetration of the crimes.

The present case is similar to *People* v. *Edelbacher* (1989) 47 Cal.3d 983, 1017-1018 [254 Cal.Rptr. 586, 766 P.2d 1], where the defense sought to

introduce evidence concerning the victim's association with "Hell's Angel-type people" and drug dealers in order to prove that someone other than the defendant committed the crime. We affirmed the trial court's ruling that the evidence was inadmissible. It did not identify a possible suspect other than the defendant or link any third person to commission of the crime, or even establish an actual motive rather than a possible or potential motive.

Defendant's reliance on *Crane* v. *Kentucky* (1986) 476 U.S. 683 [90 L.Ed.2d 636, 106 S.Ct. 2142] is misplaced. That case bears no similarity to the facts of the present case. *Crane* involved the exclusion of testimony regarding the circumstances surrounding the taking of the defendant's confession. The Supreme Court held that the ruling had denied the defendant a fair opportunity to present a defense.

(7) As an additional basis for admission of this evidence defendant argues that the evidence was admissible pursuant to Evidence Code section 356. That argument is also unavailing. Evidence Code section 356 provides in pertinent part: "Where part of an act, declaration, conversation, or writing is given in evidence . . . any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

Contrary to defendant's contention, Evidence Code section 356 did not require admission of the appointment book and weekly planners. Those books simply were not part of a writing given in evidence by the prosecution. While the prosecution introduced independent slips of paper that were clipped to the appointment book, the book and the weekly planners themselves were unnecessary to an understanding of the slips of paper.

5. *Admissibility of Prior Conviction for Impeachment.*

(8) Defendant contends that the trial court erred in ruling that his prior conviction for assault with intent to commit murder would be admissible for impeachment purposes. We do not agree. The court followed the analysis set forth in *People* v. *Castro* (1985) 38 Cal.3d 301 [211 Cal.Rptr. 719, 696 P.2d 111], interpreting article I, section 28, subdivision (f) of the California Constitution, which was enacted as part of Proposition 8 in 1982. It properly concluded that defendant's reliance on pre-*Castro* cases was not determinative and that defendant's conviction for assault with intent to commit murder involved moral turpitude. (*People* v. *Olmedo* (1985) 167 Cal.App.3d 1085, 1097-1098 [213 Cal.Rptr. 742].) The court then exercised its discretion under Evidence Code section 352, concluding that the probative value outweighed the prejudicial effect. The court noted that it could not assess the

impact of the prior conviction on defendant's testimony because no offer of proof as to that testimony had been made. Contrary to defendant's contention, the court did not state that an offer of proof was required and, indeed, noted that California law did not then require an offer of proof.[3] Because of the similarity of the prior to one of the charged crimes, the court offered to sanitize the prior by allowing reference to the conviction only as a prior felony conviction. It did not abuse its discretion in doing so. (See *People* v. *Massey* (1987) 192 Cal.App.3d 819, 825 [237 Cal.Rptr. 734].)

Defendant's reliance on pre-*Castro* and Proposition 8 cases is unpersuasive. (9) As we noted in *People* v. *Castro*, *supra*, 38 Cal.3d at page 312, the intention of the drafters of Proposition 8 was to "restore trial court discretion as visualized by the Evidence Code and to reject the rigid, black letter rules of exclusion" which had been grafted onto the code by our decisions. Accordingly, we find no abuse of discretion in the trial court's ruling.

6. *Request for Ruling in Advance on Scope of Cross-examination of Defendant.*

(10) Defendant contends that the trial court's refusal to rule on the scope of permissible cross-examination if he took the witness stand to testify on the Belvedere Park murders violated his right to testify on his own behalf.

Before the defense rested its case, defense counsel told the court that defendant wished to testify about the Belvedere Park incident on October 14, 1984, but that he did not wish to testify about the Wells murders on October 31, 1984. Counsel asked the court to limit any cross-examination of defendant to the Belvedere Park charges. Counsel indicated that defendant would testify on the issue of self-defense but gave no further details as an offer of proof. Defense counsel argued that the two incidents were entirely separate and that the direct and cross-examination could therefore be limited to the Belvedere Park charges. The prosecution disagreed, asserting that there was evidentiary spillover regarding defendant's efforts to hide the beige and brown Monte Carlo in Verduzco's garage and Ray Wells's apparent knowledge of the transaction. The trial court refused to make a ruling in advance of defendant's actual testimony, stating "whether a defendant can effectively limit the cross-examination depends upon the direct examination and may not be known until he testifies. The law is that a defendant cannot artificially limit the cross-examination and direct examination."

[3]We have since held that testimony by the defendant is a prerequisite to appellate review. (*People* v. *Collins* (1986) 42 Cal.3d 378, 383 [228 Cal.Rptr. 899, 722 P.2d 173].) The ruling here preceded our holding in *Collins*, which was to be applied prospectively only.

Defendant has failed to show that the court's ruling was erroneous. None of the authorities cited is directly on point, and none would have required the ruling sought here. Indeed, there is authority supportive of the trial court's action. (See *People* v. *Keenan* (1988) 46 Cal.3d 478, 410-513 [250 Cal.Rptr. 550, 758 P.2d 1081]; *People* v. *Williams* (1988) 44 Cal.3d 883, 912-913 [245 Cal.Rptr. 336, 751 P.2d 395].) The court acted well within its discretion.

7. *Cross-examination of Dr. Trockman.*

Dr. Donald Trockman, a forensic psychiatrist, testified as an expert witness for the defense in support of the self-defense claim as to the Belvedere Park counts. Dr. Trockman testified that there was a high correlation between ingestion of PCP and unpredictable violence and hostility. Based on his review of the autopsy report of Gilbert Martinez showing bruises and high levels of PCP and alcohol in his blood, Dr. Trockman concluded that at the time of his death, Martinez was in an angry, aggressive, violent mood. He could not reach any specific conclusion as to the mood of Anthony Aceves because he had lived for three days after the shooting.

On cross-examination Dr. Trockman testified that the mental state reached under the influence of alcohol is different from the mental state reached under the influence of PCP. The prosecutor reminded the doctor that he had testified differently in previous cases where the person was charged with being under the influence of PCP and asked the doctor whether his answer was dependent on his function in the particular case.

The prosecutor asked Dr. Trockman if Gilbert Martinez was in a violently aggressive mood during his entire period of PCP intoxication, and was told: "The important time. The time when he confronted the accused in this case." The prosecutor then asked how he knew the victim had confronted the accused and whether the defense had told him what he had to accomplish to dispel the prosecution case.

The prosecutor also asked Dr. Trockman whether, by his testimony, he tries to affect the outcome of a case. The prosecutor queried whether the witness instructed attorneys on the questions they should ask for dramatic effect, to maintain the interest of the jury, and to dispel inferences of defense bias.

During closing argument the prosecutor referred to the doctor's admission that he had testified differently in other cases about the distinction between alcohol and PCP intoxication. Based on the admission the prosecutor stated that the doctor "is a liar."

(11) Defendant contends that the prosecutor committed prejudicial misconduct in so questioning the doctor and in calling him a liar during closing argument. Although defendant objected to the questions on cross-examination, he raised no objection during argument to the prosecutor's use of the term "liar." Defendant has thus waived the latter point since any harm caused by this characterization could have been cured by a timely objection and an admonition. (*People* v. *Green* (1980) 27 Cal.3d 1, 27 [164 Cal.Rptr. 1, 609 P.2d 468].)

In any event, there was no prosecutorial misconduct. The prosecutor was entitled to question the doctor's testimonial consistency and possible bias. (*People* v. *Meneley* (1972) 29 Cal.App.3d 41, 60 [105 Cal.Rptr. 432].) Referring to testimony as "lies" is an acceptable practice so long as the prosecutor argues inferences based on the evidence and not on the prosecutor's personal belief. (*People* v. *Edelbacher*, *supra*, 47 Cal.3d 983, 1030.) Closing argument may be vigorous and may include opprobrious epithets when they are reasonably warranted by the evidence. In this case, the prosecutor's argument was based on the evidence and amounted to nothing more than vigorous yet fair argument. (*Ibid.*)

Defendant's reliance on *People* v. *McGreen* (1980) 107 Cal.App.3d 504 [166 Cal.Rptr. 360] (overruled on other grounds in *People* v. *Wolcott* (1983) 34 Cal.3d 92 [192 Cal.Rptr. 748, 665 P.2d 520]) is misplaced. In *McGreen*, the prosecutor attempted to discredit the expert witness by showing that he had received B and C grades in graduate school and that the witness's membership in certain scientific societies was a sham. The trial court eventually foreclosed further cross-examination on these grounds. The prosecutor nevertheless persisted in the line of questioning and additionally asserted that the witness's testimony had been stricken in another case because it was "patently unbelievable." When asked for authority to support the admission of such evidence of the witness's "unbelievability," the prosecutor admitted he had none. Additionally, during argument the prosecutor suggested there had been an ethics investigation of the witness and characterized the witness as an habitual liar who prostituted his credentials for $50 an hour. (*Id.* at pp. 514-517.)

In no way was the cross-examination in this case comparable to that in *McGreen*. Here, the prosecutor elicited testimony tending to show bias by questioning the witness about his contrary testimony in previous cases and his interest in helping the defense. Such cross-examination was proper. (See *People* v. *Rich* (1988) 45 Cal.3d 1036, 1088 [248 Cal.Rptr. 510, 755 P.2d 960].)

8. *Cross-examination of Ralph Ortega.*

Defendant contends the prosecutor committed multiple instances of prejudicial misconduct during the cross-examination of Ralph Ortega, defendant's alibi witness in the Wells case.

Ralph Ortega testified for the defense that he went with defendant, Eugene Valenzuela, and others to a small ranch in Tecate, Mexico on October 24, 1984. He testified further that he stayed four days and returned to Los Angeles while defendant remained at the ranch. Defendant was still there when Ortega returned around midnight on October 30. They stayed on at the ranch; defendant went with Ortega the next night, Halloween eve, to take Ortega's son trick-or-treating.

On cross-examination the prosecutor elicited from Ortega that he had been arrested about 5:45 a.m. on October 24, 1984, near the Mexican border. He established that Ortega was not released from custody until about 5 p.m. that evening. The prosecutor noted that this information had not been revealed during Ortega's testimony on direct examination and asked Ortega if defense counsel had tried to avoid this subject. The prosecutor made references to Ortega's decision to "fess up" because "I was on to you" and asked if defense counsel had explained to him that it was necessary to put defendant in Tecate around 10 or 11 a.m. on October 24. The prosecutor established that Ortega and his friends just "hung around" the ranch. The prosecutor also established that Ortega purchased and delivered food and supplies to defendant and Valenzuela during their entire stay in Tecate.

The prosecutor asked Ortega if counsel had explained to him that he would be liable as an accessory after the fact if he ever admitted that he knew that defendant had committed the Belvedere Park murders at the time he took defendant to Tecate. Ortega said no and denied any knowledge that defendant was involved.

Later, when questioning Ortega about his knowledge of the seizure of the 1968 Chevrolet Caprice at the border, the prosecutor stated: "Are you going to stop your lying here in court?" Defense counsel objected to the prosecutor's yelling, but not to the question itself.

(12) Defendant contends that the prosecutor committed misconduct by repeatedly suggesting that defense counsel had colluded with Ortega in the fabrication of Ortega's alibi testimony. In our view, the record, as described above, does not support the assertion. Moreover, defendant has waived the point by failing to object and request a timely admonition. (*People* v. *Green*, *supra*, 27 Cal.3d at p. 27.)

(13) Defendant also claims that the prosecutor used his cross-examination of Ortega to express his own personal disbelief in Ortega's testimony. Defendant refers to the questions suggesting that Ortega was lying. Again, no objection was raised below, and the point is therefore waived since any harm could have been cured by a prompt admonition. (*People* v. *Green*, *supra*, 27 Cal.3d at p. 28.)

(14) Defendant asserts that the prosecutor improperly tried to impeach Ortega with evidence of a drug arrest. Ortega was arrested as an accessory to murder in this case, but he was released from custody after one day and charges were never filed. When questioning Ortega about his arrest in this case, the prosecutor queried, "You were also arrested for something else, weren't you?" Defense counsel's objection was *sustained*. No admonition was requested or given. Under these circumstances, we fail to see how defendant could have been prejudiced by this question since the jury was already aware that Ortega had been arrested on the way to Tecate for possession of methamphetamines. Moreover, the jury was given the standard instruction (CALJIC No. 1.02) stating that a question is not evidence and that they should not guess what the answer might have been when an objection is sustained.

(15) Defendant also contends that the prosecutor improperly questioned Ortega about his failure to volunteer his exculpatory information to the police prior to trial. Defendant asserts that the prosecutor was aware that Ortega had been arrested as an accessory and had exercised his constitutional right to remain silent. Indeed, Ortega explained that he had never told the police about the alibi because he had refused to be interviewed. On redirect Ortega explained that he had given his exculpatory information to the defense attorneys and their investigator a year before the trial. Therefore, even assuming that the prosecutor's questioning in this area amounted to misconduct, we conclude that defendant suffered no significant prejudice as a result of it.

(16) Defendant complains about questions concerning remarks made in the elevator after Ortega's testimony on direct examination. The prosecutor, defense counsel, and Ortega had a conversation in the elevator as they left the courthouse. No jurors were present in the elevator. The following morning, defense counsel reopened direct examination and questioned Ortega about the conversation in the elevator. Ortega testified that the prosecutor threatened him and said "someone is going to jail behind this."

On cross-examination the prosecutor asked Ortega whether he (the prosecutor) had made the alleged threat in response to a question asked by

defense counsel. When Ortega answered yes, the prosecutor asked if defense counsel had said "Well, how do you guys like what happened in there today?" Defense counsel objected and denied making the statement. The objection was overruled. Ortega responded that he had heard defense counsel say only, "What's up?"

Defendant argues that the prosecutor's question was asked in bad faith. The claim is supported by nothing more than defendant's bald assertion. No police officers who overheard the conversation were called as witnesses by either the prosecution or the defense. Since the record contains no basis for branding the prosecutor's questioning as bad faith, we reject defendant's contention.

9. *Prosecutor's Argument.*

Defendant contends that the prosecutor committed prejudicial misconduct in a number of respects in addition to the claims that we have already discussed. (17a) First, defendant charges the prosecutor with improper attacks on defense counsel. During the course of his lengthy review of the testimony of virtually every witness, the prosecutor referred to attempts by defense counsel to mislead the jury and, at one point, accused defense counsel of perpetrating a fraud on the court. The prosecutor also referred to defense theories and evidence as "ridiculous" and "nonsense." Defendant interprets the prosecutor's characterization of the defense testimony as lies and concoctions, to be an accusation of defense fabrication of evidence. Defendant also complains about the prosecutor's repeated references to defense counsel's reaction to particular testimony.

(18) "A prosecutor may vigorously argue his case, marshalling the facts and arguing inferences to be drawn therefrom. (*People* v. *Fosselman* (1983) 33 Cal.3d 572, 580 [189 Cal.Rptr. 855, 659 P.2d 1144].) We have held he may not express a personal belief in defendant's guilt, in part because of the danger that jurors may assume there is other evidence at his command on which he bases this conclusion. (*People* v. *Bain* (1971) 5 Cal.3d 839, 848 [97 Cal.Rptr. 684, 489 P.2d 564].) We have also held it improper for the prosecutor to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case. It is not necessary to find that such implication impinges upon defendant's constitutional right to counsel. (Compare *People* v. *Turner* (1983) 145 Cal.App.3d 658, 674 [193 Cal.Rptr. 614].) Instead it is sufficient to note that defendant's conviction should rest on the evidence, not on derelictions of his counsel. (*People* v. *Perry* (1972) 7 Cal.3d 756, 790 [103 Cal.Rptr. 161, 499 P.2d 129]; *Bain*, *supra*, 5 Cal.3d at p. 847.) Casting uncalled for aspersions on defense

counsel directs attention to largely irrelevant matters and does not constitute comment on the evidence or argument as to inferences to be drawn therefrom." (*People* v. *Thompson* (1988) 45 Cal.3d 86, 112 [246 Cal.Rptr. 245, 753 P.2d 37].)

(17b) Defendant objected to many, but not all, of the cited instances. For the most part, his objections were overruled. The court did, however, sustain his objection to the accusation of perpetrating a fraud on the court. It admonished the jury to disregard the comment, stating that there had been no perpetration of a fraud by any lawyer in this case. While we agree that many of the cited remarks were improper, we do not find them to have been prejudicial. The prosecutor was entitled to argue the inconsistencies in the evidence and even to characterize inconsistent testimony as "lies." (See *People* v. *Edelbacher*, *supra*, 47 Cal.3d at p. 1030.) Here, however, the prosecutor went beyond that point on several occasions, denigrating counsel instead of the evidence. Personal attacks on opposing counsel are improper and irrelevant to the issues. The prosecutor's reference to counsel's reaction to particular evidence was also improper for the same reason, but we do not interpret it as a charge of fabrication of evidence. All of these remarks were a small part of the prosecutor's very lengthy review of the evidence presented. They were clearly recognizable as an advocate's hyperbole. (See *People* v. *Poggi*, *supra*, 45 Cal.3d at p. 340.) Accordingly, we find no reasonable probability that the jury would have reached a more favorable result absent the objectionable comments. (*People* v. *Green*, *supra*, 27 Cal.3d at p. 36.)

(19) Defendant also contends that the prosecutor committed misconduct because he expressed personal opinions regarding the defense case. Defendant refers to the prosecutor's statement that "I shake my head in disbelief every time I think about it [Ralph Ortega's testimony]." Defendant also makes reference to the prosecutor's statement: "They know the defendant killed those boys. And they know he killed Ray and Marlene Wells." Finally, defendant complains about the prosecutor's argument about the disparities between defense promises of proof in the opening statement and the trial evidence. Defendant waived all but the first point by failing to raise a timely objection at trial. (*People* v. *Green*, *supra*, 27 Cal.3d at p. 27.) As to the first point, the remark was made in the context of reviewing the discrepancies in defense testimony and was not likely to be understood as being based on anything outside the record.

(20) Defendant further charges that the prosecutor committed misconduct by referring to defendant's failure to testify at trial. The prosecutor argued that he forestalled defense testimony by preemptively proving that

defendant did not need glasses at the time of the Belvedere Park offenses: "I should not have proved to you earlier in the trial that he didn't need glasses at the time in the park, because then you would have heard, 'Well, I was in the park, and you can see all the witnesses say I didn't have any glasses on. And I saw one guy go do my friend in with a knife. And another one came to me, and I thought he was going to do me in. I ran over to help my friend and shot him, and I shot him twice. I saw the other one. I couldn't see good who was doing what to me, so I shot him. And the other one coming at me, I shot him, too, because I just couldn't see good.' That's what you would have heard." A defense objection under *Griffin* v. *California* (1965) 380 U.S. 609 [14 L.Ed.2d 106, 85 S.Ct. 1229] (*Griffin*) was sustained, and the court admonished the jury to disregard the prosecutor's comments to the extent they reflected on the defendant's not testifying. The prosecutor referred to the glasses again in his rebuttal, stating: "And I argued in my opening argument the fact that you would hear or you would have heard, had we given them a little rope to hang themselves, also you would have heard, 'Well, I couldn't see. I didn't have my glasses on, so therefore that's why I shot this person and I had to shoot this person.'" The defense objection was overruled.

We believe that the court's initial admonition was sufficient to obviate any *Griffin* concern. To the extent that the rebuttal comment could be construed as a reference to defendant's failure to testify, in context, it was clearly harmless. The reference was a minor feature in this seemingly marathon argument.

(21) Defendant contends that the prosecutor committed misconduct by referring to defendant's courtroom appearance (wearing a suit, wearing reading glasses, being clean-shaven) as a "ploy" and by asserting that defendant did not need to wear the glasses all the time during the trial. Defendant waived these points by failing to object at trial, since any harm could have been cured by timely objection and prompt admonition. (*People* v. *Green*, *supra*, 27 Cal.3d at p. 27.) In any event, these statements could not have had a prejudicial effect in light of the overwhelming evidence of the Belvedere Park killings.

In sum, we find no denial of due process or a fair trial as a result of any misconduct committed by the prosecutor. Both sides seemed unduly argumentative and personal on occasion, but such instances were not so frequent or severe as to detract from the jury's fair consideration of the evidence.

10. *Instruction on Reasonable Doubt*

In a supplemental brief, defendant argues that the instruction on reasonable doubt, CALJIC No. 2.90, is constitutionally flawed, citing *Cage* v.

Louisiana (1990) 498 U.S. __[112 L.Ed.2d 339, 111 S.Ct. 328]. Similar challenges to CALJIC No. 2.90 were raised and rejected in *People* v. *Jennings* (1991) 53 Cal.3d 334, 385-386 [279 Cal.Rptr. 780, 807 P.2d 1009] and *People* v. *Johnson* (1992) 3 Cal.4th 1183, 1234-1235 [__Cal.Rptr.2d __, __P.2d __]. As we noted in *Jennings* and *Johnson*, despite use of the term "moral certainty" in CALJIC No. 2.90, the instruction does not suffer from the flaws condemned in *Cage* v. *Louisiana*, *supra*, 498 U.S. __[112 L.Ed.2d 339, 111 S.Ct. 328].

Defendant also cites Justice Mosk's criticism of CALJIC No. 2.90 in his concurring opinion in *People* v. *Brigham* (1979) 25 Cal.3d 283, 292-316 [157 Cal.Rptr. 905, 599 P.2d 100]. Recognizing that CALJIC No. 2.90 is a verbatim copy of section 1096, Justice Mosk urged the Legislature to redraft the definition of reasonable doubt in section 1096 to make it intelligible to modern juries. The Legislature has not responded. As Justice Mosk recognized, such changes must come from the Legislature.

PENALTY PHASE FACTS

Evidence in Aggravation.

The penalty case-in-aggravation consisted of evidence of three prior crimes by defendant: 1) a 1978 assault upon a police officer; 2) a 1979 conviction of assault with intent to commit murder; and 3) a 1985 assault on a fellow jail inmate.

1. *1978 Assault.*

Deputy Sheriff Randall Prestwich testified that on May 13, 1978, he and his partner heard gunshots in the vicinity of Arizona Street in Los Angeles. They saw defendant and two other men run from a house. Defendant had a shotgun. Deputy Prestwich yelled at the men to freeze. The other two ran off, and defendant brought the gun up to his waist and flinched, as if he expected the gun to go off. Deputy Prestwich fired a shot at defendant and saw defendant flinch again. Defendant turned and ran. Deputy Prestwich caught him and arrested him for assault on a police officer.

2. *1979 Assault.*

Ernest Leos testified that on March 17, 1979, he and his son were in their driveway when Jesse Trujillo's car stopped in front of the driveway. Leos's son, Ernest, Jr., went over to the car and was shot while talking to someone in the car. Defendant was convicted of assault with intent to commit murder for this shooting.

3. *1985 Assault.*

Deputy Sheriff Kenneth Salazar testified that on March 21, 1985, defendant was working as a trusty in the high security section of Los Angeles County jail. After defendant had finished passing out and collecting breakfast trays, he was ordered back to his cell so that Guy Walker could leave his cell to take a shower. Walker received a razor blade and soap and went into the shower. Defendant was then released from his cell to complete his duties.

Deputy Lujan saw defendant run into the shower area, approach Walker, and move his fist toward Walker's head. Deputy Salazar saw defendant run from the shower area to the toilet area. As he followed defendant, Deputy Salazar saw Guy Walker slumped on the floor with blood on his face. Deputy Salazar heard a toilet flush. When he reached the toilet area, defendant was standing over a toilet. Deputy Salazar found a small piece of razor in the doorway leading to the toilet area. Walker's injuries could have been caused by a razor blade.

Evidence in Mitigation

1. *Walker Incident.*

Guy Walker testified for defendant. He and defendant had several arguments in March 1985 because defendant had been named trusty and had the cell Walker wanted. Walker tried to cut defendant's throat and to stab him. That same week, defendant entered the shower area and they fought.

2. *In-custody Behavior.*

Deputy Sheriffs Ronald Hernandez and Anthony Campbell, assigned to the Los Angeles County jail, had never had problems with defendant. Defendant was helpful and friendly, and both deputies voted for him to be appointed a jail trusty.

3. *Defendant's Family and Friends.*

Patricia Solis struck up a friendship with defendant after she had been dismissed as a prospective juror in the case. She described defendant as an intelligent and sensitive person, who cared about other people, and loved his children.

Edward Dominguez had known defendant since 1976, when he opened his liquor store in the neighborhood. Defendant was always a gentleman and, on one occasion, prevented a fight in the store.

Richard Rodriguez, a gang consultant affiliated with the California Youth Authority, testified that although Arizona Marivilla was once a street gang, since 1982 it had been incorporated as a neighborhood association. Defendant participated in the youth program when he was released from prison in May 1984.

Defendant's wife and son described him as a nice, lovable man who is a good father.

Defendant's mother, Elizabeth Luna, testified that defendant's father, who had been abusive to her and the children, died when defendant was six or seven. Luna then "went wild," and began drinking and partying. Defendant became "the man of the house" upon his father's death, and he took care of his four brothers and sisters, even stealing on occasion so they could eat.

PENALTY PHASE CONTENTIONS

1. *Evidence of Gang Affiliation.*

(22) Defendant contends that the erroneous admission of his gang affiliation in the guilt phase prejudiced him in the penalty phase because he had to call Richard Rodriguez to rebut that evidence and the prosecutor improperly cross-examined him.

As previously noted, Richard Rodriguez testified in mitigation that the Arizona Marivilla gang, which had been violent, was reformulated in 1982 as a neighborhood association with the goal of keeping the peace. He testified that after defendant left prison in 1984 he was not involved in gang activities and that defendant was working to keep young people out of gangs. On cross-examination the prosecutor asked Rodriguez if it was true that Arizona Marivilla was one of the most violent gangs in East Los Angeles and responsible for most of the murders in that area from 1975 to 1985. The prosecutor also asked if defendant was one of the most active members.

We find no error. First, we have already concluded that the evidence of defendant's gang membership was properly admitted at the guilt phase. Second, the prosecutor was entitled to attempt to negate the evidence in mitigation to the effect that the Arizona Marivilla was now simply a peaceful neighborhood association. (*People* v. *Thompson*, *supra*, 45 Cal.3d at p. 124.) (23) It is well established that the prosecution may inquire of a defense reputation witness whether he has heard of acts or conduct by the defendant inconsistent with the witness's testimony so long as the People have a good faith belief that the acts or conduct about which they wish to

inquire actually took place. (*People* v. *Siripongs* (1988) 45 Cal.3d 548, 578 [247 Cal.Rptr. 729, 754 P.2d 1306].)

2. *Consideration of Defendant's Age.*

(24) Defendant contends that the jury was improperly allowed by the court and prosecutor to consider his age as a factor in aggravation. Defendant was 26 at the time of the offenses. The court rejected defendant's special instruction stating that if defendant's age were to be considered, it could be considered only as a mitigating factor. The court gave CALJIC No. 8.84.1, which permitted the jury to consider "the age of the defendant at the time of the crime" in determining the appropriate penalty.

During the penalty argument, the prosecutor reviewed the factors listed in CALJIC No. 8.84.1 and argued: "The age of the defendant at the time of the crime. He is obviously old enough to know the difference between right and wrong, and that's aggravation."

Defendant acknowledges that we have rejected attacks on the instruction given. (See, e.g., *People* v. *Rodriguez* (1986) 42 Cal.3d 730, 777-779 [230 Cal.Rptr. 667, 726 P.2d 113]; *People* v. *Lucky* (1988) 45 Cal.3d 259, 301-302 [247 Cal.Rptr. 1, 753 P.2d 1052].) As we noted in *People* v. *Lucky*, *supra*, at page 302, mere chronological age should not of itself be deemed either aggravating or mitigating: "In our view, the word 'age' in statutory sentencing factor (i) is used as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue any such age-related inference in every case." (*Ibid.*)

The court did not err in rejecting defendant's proposed special instruction, since it stated that inferences relating to defendant's age could be considered only as a mitigating factor. Nor was there any impropriety in the prosecutor's argument. The prosecutor's argument that defendant was old enough to know better, thus making it aggravating, is an age-related inference that has been found permissible in a number of cases. (See *People* v. *Bonin* (1988) 46 Cal.3d 659, 704-705, fn. 6 [250 Cal.Rptr. 687, 758 P.2d 1217]; *People* v. *Brown* (1988) 46 Cal.3d 432, 456-457 [250 Cal.Rptr. 604, 758 P.2d 1135].)

Defendant urges us to reexamine our construction of the age factor in *People* v. *Lucky*, *supra*, 45 Cal.3d 259 and succeeding cases, arguing that the unfettered discretion regarding how the factor is to be considered renders it unconstitutional under the principles of *Gregg* v. *Georgia* (1976) 428 U.S. 153 [49 L.Ed.2d 859, 96 S.Ct. 2909] and *Maynard* v. *Cartwright* (1988) 486

U.S. 356 [100 L.Ed.2d 372, 108 S.Ct. 1853]. We rejected a similar argument in *People* v. *Babbitt* (1988) 45 Cal.3d 660, 716 [248 Cal.Rptr. 69, 755 P.2d 253] and are not persuaded that we should reexamine that reasoning. (See also *People* v. *Edwards* (1991) 54 Cal.3d 787, 844 [1 Cal.Rptr.2d 696, 819 P.2d 436].)

3. *Reference to Suffering by Victims and Their Families.*

(25) Defendant contends that the prosecutor violated *Booth* v. *Maryland* (1987) 482 U.S. 496 [96 L.Ed.2d 440, 107 S.Ct. 2529] and *South Carolina* v. *Gathers* (1989) 490 U.S. 805 [104 L.Ed.2d 876, 109 S.Ct. 2207] by urging the jury to consider characteristics of the victims and the loss suffered by the victims' families. The allegedly objectionable references were made in response to defense counsel's argument that the jury should consider defendant's difficult childhood, including the fact that he had to become the man of the house at the age of eight, as illustrated by a photograph of defendant at his father's funeral.[4]

The prosecutor stated: "I want you to think about this. I want you to look at this picture very hard. When you have got it back there in that room look at it. How hurtful it was at the time or hurtful it is when you see it years later. But remember the Aceves family. Replace all these faces. Put Anthony Aceves in the casket.

"Put Anthony Aceves in that casket. Put his family around it. Because it happened two years ago they are not victims? They are hurt. He should be given compassion? The way he executed that boy?

"Think about the parents and the family of Gilbert Martinez. When they were standing around his casket and they were crying and they were saying 'My God, how could this happen to my child?'

"Marlene Wells. When she was on the ground and the defendant was standing over her and putting two bullets in the back of her head just before she is looking up at him. 'Don't kill me.' Begging for her life. And he shoots her brutally in the back of the head.

"Think about it. They are funerals. Every time you look at this funeral photograph produced by the defense you think of their funerals. You think of their families. And you are called upon to impose death in cases like this when it's so aggravated. How many people must he kill?"

[4]Defendant's mother testified that defendant was six or seven when his father died. The prosecutor, however, referred to defendant as having been eight at the time of his father's death.

During the pendency of this appeal, both *Booth* v. *Maryland*, *supra*, 482 U.S. 496 and *South Carolina* v. *Gathers*, *supra*, 490 U.S. 805, were largely overruled. In *Payne* v. *Tennessee* (1991) 501 U.S. __[115 L.Ed.2d 720, 111 S.Ct. 2597], the United States Supreme Court held that the use of victim impact evidence does not offend the Eighth Amendment guaranty of an individualized penalty assessment in a capital trial. We have since held that the injury inflicted by the defendant—including evidence about the victim and the impact of the crime on the victim's family—is one of the circumstances of the crime, evidence of which is admissible under section 190.3, factor (a). (*People* v. *Edwards*, *supra*, 54 Cal.3d 787, 833-836; *People* v. *Fierro* (1991) 1 Cal.4th 173, 234-235 [3 Cal.Rptr.2d 426, 821 P.2d 1302].)

The prosecutor's remarks qualified for admission under the principles set forth in *Payne* v. *Tennessee*, *supra*, 501 U.S. __[115 L.Ed.2d 720, 111 S.Ct. 2597] and *People* v. *Edwards*, *supra*, 54 Cal.3d 787. Accordingly, defendant's claim must be rejected.

4. *Biblical References.*

Defendant contends that the prosecutor violated his rights to due process, a fair trial, separation of church and state, and freedom from cruel and unusual punishment by quoting biblical authority in his final argument. We agree that the prosecutor's argument was improper, but we conclude that it does not require reversal of the penalty judgment.

During final argument, defense counsel stated, inter alia: "It seems almost to be in the theater of absurd to be talking about life and death. I don't know what gives me the right to talk about it . . . . [¶] What we have to really talk about is values, purpose. You have to confront yourselves in terms of your own feelings, what you demand from society, what you really demand from Mr. Sandoval, what you demand from yourselves. [¶] Revenge? That's really what we're talking about. When you convicted Mr. Sandoval of these four murders and found the special circumstances to be true, you already guaranteed one thing. Fred Sandoval will die in the penitentiary is one of them in the State of California. Period. He will never come out. He will die in the penitentiary. [¶] The question is is he going to die whatever it is in three years in the gas chamber or is he going to die of old age in the pen or is he going to die because someone stabs him in the back in the penitentiary? But the reality is that he is going to die in the penitentiary. That's already been decided and you decided that.

"And in facing you again and thinking about that and thinking about how hard your job is, how difficult your job is, in reality you could sit, play God

to an individual. . . . [¶] In some sense, I really don't know which is worse, execution or the gas chamber or that kind of life in prison. But you have that power alone. Any one of you can stop the execution alone. You have that power. I have never held that awesome power of holding a person's life in my hands. You have that power. You alone. [¶] You also have that responsibility that you are going to carry for the very rest of your life whether you push that button or not. And the bottom line is it's revenge. Because society to you because you are society, you want to extract revenge. Or is it bad enough to stop it and let this man live out his life in prison? . . . [¶] I have come to grasp it now. I looked at you in the eye and you can look back at me. Doesn't change anything. Nothing will bring back Anthony Aceves and Gilbert Martinez and the two Wells. Nothing. Won't change. Bottom line is revenge. Just pure and simple. Vengeance.

"If that's what you want, that's what you felt, you push the button. An eye for an eye, a tooth for a tooth, a stripe for a stripe, a life for a life. [¶] I don't think society requires revenge. I don't think that you require revenge. An eye for an eye. [¶] Ghandi said we do this eye for an eye thing, make society require it and do it, what happens is the whole world becomes blind. The light is shut out. That's not right. Don't shut out the light. Don't make the world blind. Don't push that button."

The prosecutor responded to defense counsel's argument by stating: "He told you that it's absurd to talk about life and death, that the law is absurd, that you are playing God, that it's revenge. [¶] And that is to get you, of course, to vote for life without the possibility of parole. Well, death is a legitimate means of punishment in this state. It's available in this state. You are called upon to impose it if you think it's appropriate. You are a cross section of the community. People are judged by a jury of their peers. You make that determination whether the defendant should get the death penalty or life without the possibility of parole. The defense wants to make that burdensome for you. ['] Each and everyone [*sic*] of you from here on must live with that decision. Push that button over there. You must live with that decision for the rest of your life.['] [¶] Well if it wasn't you called upon to carry out the will of the People of the State of California, would have been another jury, because that's our system. That's how the law is affected in this state. [¶] Don't once think that you have to feel burdened and depressed because I voted for death. You are doing what the law says if it's substantial, the aggravation substantially outweighs the mitigation. Don't listen to this lawyer talk. . . ."

"Mr. Applebaum says don't play God. Let every person be in subjection to the governing authorities for there is no authority except from God and those

which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear or authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an Avenger who brings wrath upon one who practices evil. [¶] You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right. . . . [¶] . . . Let him have the opportunity to get his soul right. That's the only way to get his attention. You are not playing God. God ordains authority."

(26a) Defendant asserts that the material in the previous paragraph was a paraphrase of Romans 13:1-7 and that such reliance on biblical authority to advocate imposition of the death penalty is improper. We agree.

The People seek to justify the argument as having been appropriate rebuttal to defense counsel's argument. While the question is close, we are of the opinion that the prosecutor's argument crossed the line of permissible argument and rebuttal. There are situations in which the prosecutor has been allowed to make comments in rebuttal that would otherwise be improper when such comments are fairly responsive to the argument of defense counsel. (See *People* v. *McDaniel* (1976) 16 Cal.3d 156, 177 [127 Cal.Rptr. 467, 545 P.2d 843]; *People* v. *Hill* (1967) 66 Cal.2d 536, 560 [58 Cal.Rptr. 340, 426 P.2d 908]; see also *United States* v. *Robinson* (1988) 485 U.S. 25, 31-34 [99 L.Ed.2d 23, 30-33, 108 S.Ct. 864].) This, however, is not such a situation.

Here, the prosecutor paraphrased a passage of the Bible that is commonly understood as providing justification for the imposition of the death penalty. Such argument is improper. "The closing statements of counsel should relate to the law and the facts of the case as each side interprets them." (*People* v. *Hawthorne*, *ante*, 43, at p. 60 [__Cal.Rptr.2d __, __P.2d __].) Though not expressly identified as such, the passage was unmistakably biblical in style and readily recognizable by persons schooled in the Christian religion. The prosecutor "may state matters not in evidence that are common knowledge, or are illustrations drawn from common experience, history, or literature." (*People* v. *Love* (1961) 56 Cal.2d 720, 730 [16 Cal.Rptr. 777, 366 P.2d 33].) He may not, however, invoke higher or other law as a consideration in the jury's sentencing determination. (*Jones* v. *Kemp* (N.D.Ga. 1989) 706 F.Supp. 1534, 1559; *Commonwealth* v. *Chambers* (1991) 528 Pa. 558 [599 A.2d 630, 644].) The argument here was clearly improper by exhorting the jury to consider factors outside section 190.3 in making its penalty determination.

(27) Penalty determinations are to be based on the evidence presented by the parties and the legal instructions given by the court. Reference by either party to religious doctrine, commandments or biblical passages tending to undermine that principle is improper. We recognize that the defense must be allowed some latitude in its presentation of mitigating evidence. Nevertheless, we do not understand that latitude to include exhortation of religious canons as a factor weighing against the death penalty. If the defense were to present such argument, it would be subject to objection by the prosecution and possible like-kind argument in rebuttal. (See *United States* v. *Robinson*, *supra*, 485 U.S. at pp. 31-34 [99 L.Ed.2d at pp. 30-33].) What is objectionable is reliance on religious authority as supporting or opposing the death penalty. The penalty determination is to be made by reliance on the legal instructions given by the court, not by recourse to extraneous authority. (*Jones* v. *Kemp*, *supra*, 706 F.Supp. 1534, 1559.) We do not mean to rule out all reference to religion or religious figures so long as the reference does not purport to be a religious law or commandment.

(26b) Though we have found that the argument in this case constituted misconduct, we do not find that it requires reversal of the penalty judgment. The jurors deliberated for four days before indicating that they were split six to six on two counts and five to seven on the other two. After further deliberations the next day, they returned verdicts of life without possibility of parole on three of the counts and death on only one of the counts. Under these circumstances, we find no reasonable possibility that the jury would have reached more favorable verdicts had the misconduct not occurred. (See *People* v. *Brown*, *supra*, 46 Cal.3d 432, 448-449.) The result is the same under the federal *Chapman* test (*Chapman* v. *California* (1968) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065]).

5. *Jury Deadlock.*

Defendant contends that the trial court coerced the jury's verdict by requiring it to continue deliberating after the jury had declared a deadlock.

The jury retired for its penalty deliberations at 1:10 p.m. on Thursday, March 12, 1987, and deliberated until 2:45 p.m. Deliberations continued at 8:05 a.m. on Friday morning until the court recessed the jury at 11:45 a.m. to allow counsel time to submit argument on the appropriate response to a question submitted by the jury. The jury had been given separate verdict forms for each victim and it asked whether it could find that different penalties are applicable to different counts. On Monday morning, March 16, 1987, the court responded to the jury's question by stating, "you should reach a verdict as to each count if you can." At 8:50 a.m. the jury resumed

deliberations and continued until court was adjourned at 1:30 p.m. Deliberations continued on Tuesday, March 17, for an hour and a half. After deliberating two and a half more hours the next morning, March 18, the jury sent the court a note stating, "We cannot reach a verdict. How do you proceed from this point on, and what would you like us to do?" The court called the jury out and asked the foreman whether there was "any reasonable possibility, and I emphasize the word 'possible' that the jury can arrive at a verdict as to any count given further deliberations, the rereading of any testimony or the answering of any question that I can answer?" The foreman answered, "No. We have discussed that possibility, and we don't believe that we can reach a verdict." The court then asked for the jury division on each count and was told that it was six to six on count 1, six to six on count 2 five to seven on count 3, and five to seven on count 4. The court then polled each juror as to "whether you think there is a reasonable possibility with further deliberations you can arrive at a verdict as to any of the counts," and each juror replied, "No."

In a conference outside the jury's presence, the court indicated that it wanted the jury to spend a little more time and that it would probably declare a mistrial if the jury did not reach a verdict the next day. The court estimated that the jury had deliberated for about three full days and noted that a little more time would not be unreasonable in light of the fact that the trial had lasted five months. The court released the jury for that day with directions to return at 7:45 a.m. the next morning. After further deliberations the next morning, Thursday, March 19, 1987, the jury returned its verdicts of life without possibility of parole as to counts 1, 2 and 3, and a verdict of death as to count 4.

Section 1140 provides: "Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

(28) "The determination whether there is reasonable probability of agreement rests in the discretion of the trial court. (*People* v. *Miller* (1990) 50 Cal.3d 954, 993 [269 Cal.Rptr. 492, 790 P.2d 1289]; *People* v. *Sheldon* (1989) 48 Cal.3d 935, 959 [258 Cal.Rptr 242, 771 P.2d 1330]; *People* v. *Rodriguez* (1986) 42 Cal.3d 730, 775 [230 Cal.Rptr. 667, 726 P.2d 113]; *People* v. *Rojas* (1975) 15 Cal.3d 540, 546 [125 Cal.Rptr. 357, 542 P.2d 229, 92 A.L.R.3d 1127]; *People* v. *Carter* (1968) 68 Cal.2d 810, 817 [69 Cal.Rptr. 297, 442 P.2d 353].) The court must exercise its power, however,

without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.' (*People* v. *Carter*, *supra*, 68 Cal.2d at p. 817.)" (*People* v. *Breaux* (1991) 1 Cal.4th 281, 319 [3 Cal.Rptr.2d 81, 821 P.2d 585].) The question of coercion is necessarily dependent on the facts and circumstances of each case. (*Ibid.*)

(29) Defendant argues that the length of time the jury had been deliberating demonstrates that the jury had given careful consideration to the evidence and that a mistrial would have been warranted. (Compare *People* v. *Rich*, *supra*, 45 Cal.3d 1036, 1117 [court declined to declare mistrial on penalty after jury declared itself unable to reach verdict following only one hour of deliberation].) Defendant also cites the virtually even split and the jurors' individual statements against the usefulness of further deliberations as indicating that the court should have declared a mistrial. None of these factors, however, removed the court's discretion to require further deliberations. The jury had deliberated a similar amount of time in *People* v. *Breaux*, *supra*, 1 Cal.4th 281, 317-320, when it was asked to continue even though all of the jurors were negative on the prospects of a verdict. In *People* v. *Rodriguez*, *supra*, 42 Cal.3d 730, 774-777, we found no abuse of discretion in requiring the jury to continue deliberating after it declared itself unable to reach a verdict following 18 days of deliberation.

As further evidence of his claim that the verdict was coerced, defendant points to the facts that the order to continue deliberations was unaccompanied by further explanation and that the verdicts were reached shortly thereafter. The form of the verdicts—three for life and one for death—is also cited as evidence of "considerations of compromise and expediency" (*People* v. *Carter*, *supra*, 68 Cal.2d at p. 817) rather than independent judgment. We are not persuaded. Other explanations for the difference in the verdicts are readily apparent. The jury may have felt that only one death verdict was necessary and that the killing of Marlene Wells was most egregious since she had no involvement with defendant. Thus the difference in the verdicts may be explained by the difference in the circumstances of the crimes. Defendant's assertion that the verdicts should have been uniform is based on the incorrect premise that the aggravating and mitigating circumstances were the same as to each count. They were not. Each murder had its own set of circumstances, which qualified for consideration under factor (a) of section 190.3.

Nothing in the record suggests that the jury was coerced in any way. The court made no statements that could be interpreted as exerting pressure on any juror. The court viewed the jury as a responsible group that took its duty seriously. The court was not unreasonable in concluding that, in light of the

fact that the trial itself had taken some five months, the jury should put in a little more time than the fourteen and one-quarter hours it had deliberated up to that point. The record shows no abuse of discretion.

6. *Separate Verdict Forms.*

(30) Defendant contends that the trial court erred in requiring the jury to return a separate penalty verdict as to each murder victim. Defendant argues that the multiple verdicts obscured the overriding constitutional value of reaching a comprehensive determination of the appropriateness of the death penalty considering all aggravating and mitigating circumstances and invited compromise verdicts. He also claims that the multiple penalty verdicts placed undue emphasis on the characteristics and status of the individual victims, relying on *Booth* v. *Maryland*, *supra*, 482 U.S. 496 and *South Carolina* v. *Gathers*, *supra*, 490 U.S. 805. We are not convinced.

A defendant who kills more than one person may be convicted and punished for each murder. (*People* v. *Andrews* (1989) 49 Cal.3d 200, 225 [260 Cal.Rptr. 583, 776 P.2d 285]; *People* v. *Ramos* (1982) 30 Cal.3d 553, 587 [180 Cal.Rptr. 266, 639 P.2d 908].) Separate penalty verdicts have been returned in other capital cases. The defendant in *People* v. *Bittaker* (1989) 48 Cal.3d 1046 [259 Cal.Rptr. 630, 774 P.2d 659] was convicted of first degree murder of five victims and was given separate death verdicts as to each murder victim. (*Id.* at pp. 1106, 1110, fn. 34.) Likewise, the defendant in *People* v. *Mattson* (1990) 50 Cal.3d 826 [268 Cal.Rptr. 802, 789 P.2d 983], who was convicted of the first degree murder of two girls, was given a separate verdict of death as to each murder victim. (*Id.* at p. 838.) We are not persuaded that there is any impropriety in requiring the jury to return a separate penalty verdict for each capital murder count.

7. *Standard for Imposition of Death.*

(31) The court gave CALJIC No. 8.84.2 (1986 rev.) on the standards for determining the penalty verdicts. Defendant objects to the following language in that instruction: "To return a judgment of death, each of you must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors that it warrants death instead of life in prison without parole." Defendant complains that the instruction did not inform the jury that a necessary condition for imposition of the death penalty is a finding that aggravation outweighs mitigation rather than merely being "so substantial in comparison."

We rejected a similar challenge to this language in *People* v. *Breaux*, *supra*, 1 Cal.4th at pages 315-316. There, as in this case, the language in

question was preceded by instructions that provide: "The weighing of aggravating and mitigating factors does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various . . . factors you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of aggravating factors with the totality of the mitigating factors." The instructions given, in our view, were sufficient to inform the jury that it could return a death verdict only if the aggravating circumstances outweighed the mitigating circumstances.

8. *Cumulative Error.*

Defendant contends that the cumulative effect of errors during the penalty phase trial requires reversal of the penalty. Since we have found only one error in the penalty phase, there is no cumulative effect.

CONCLUSION

The judgment is affirmed.

Lucas, C. J., Kennard, J., Arabian, J., Baxter, J., and George, J., concurred.

MOSK, J., Concurring and Dissenting.—I concur in the judgment as to guilt, death eligibility, and noncapital sentence. After review, no error or other defect is evident requiring reversal or vacation on any of these issues.

I dissent, however, from the judgment as to the sentence of death. As will appear, there was prejudicial prosecutorial misconduct bearing on this question.

I

In summation at the penalty phase, defense counsel urged the jury to fix the penalty for defendant at life imprisonment without possibility of parole.

By contrast, the prosecutor asked for death. In the course of his argument, he made the following comments.

"I want to respond to some of the things argued by [defense counsel]. He told you that it's absurd to talk about life and death, that the law is absurd, that you are playing God, that it's revenge.

"And that is to get you, of course, to vote for life without the possibility of parole. Well, death is a legitimate means of punishment in this state. It's available in this state. You are called upon to impose it if you think it's appropriate. You are a cross section of the community. People are judged by a jury of their peers. You make that determination whether the defendant should get the death penalty or life without the possibility of parole. The defense wants to make that burdensome for you. ['] Each and everyone [*sic*] of you from here on must live with that decision. Push that button over there. You must live with that decision for the rest of your life.[']

"Well, if it wasn't you called upon to carry out the will of the people of the State of California, would have been another jury, because that's our system. That's how the law is affected in this state.

"Don't once think that you have to feel burdened and depressed because I voted for death. You are doing what the law says if it's substantial, the aggravation substantially outweighs the mitigation. Don't listen to this lawyer talk.

". . . . . .

"[Defense counsel] says don't play God. ['] Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an avenger who brings wrath upon one who practices evil.[']

"You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right. . . .

". . . . . .

". . . Let him have the opportunity to get his soul right. That's the only way to get his attention. You are not playing God. God ordains authority."

At this point, defense counsel objected and asked to approach the bench, but met with summary denial.

II

"It is of course misconduct for a prosecutor to invoke purported religious law in support of the imposition of the penalty of death." (*People* v. *Hill* (1992) 3 Cal.4th 959, 1016 [__Cal.Rptr.2d __, __P.2d __] (conc. opn. of Mosk, J.); accord, *People* v. *Wrest* (1992) 3 Cal.4th 1088, 1107 [__Cal.Rptr.2d __, __P.2d __].)

"Argument of this sort by a representative of the government offends California statutes and judicial decisions, which establish the positive, secular law of this state as the rule governing the choice between life and death (see *People* v. *Mincey* (1992) 2 Cal.4th 408, 483-484 [6 Cal.Rptr.2d 822, 827 P.2d 388] (conc. & dis. opn. of Mosk, J.)). It also violates the United States and California Constitutions—including their respective clauses concerning establishment of religion (U.S. Const., Amend. I; Cal. Const., art. I, § 4), cruel and unusual punishments (U.S. Const., Amend. VIII; Cal. Const., art. I, § 17), and due process of law (U.S. Const., Amend. XIV; Cal. Const., art. I, § 15)." (*People* v. *Hill*, *supra*, 3 Cal.4th at pp. 1016-1017 (conc. opn. of Mosk, J.); see also *People* v. *Wrest*, *supra*, 3 Cal.4th at p. 1107 [holding that "such an argument tends to diminish the jury's sense of responsibility for its verdict and to imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions"].)

"It is well settled that religion may not play a role in the sentencing process." (*Jones* v. *Kemp* (N.D.Ga. 1989) 706 F.Supp. 1534, 1559; accord, *People* v. *Mincey* (1992) 2 Cal.4th 408, 485 [6 Cal.Rptr.2d 822, 827 P.2d 388] (conc. & dis. opn. of Mosk, J.)]; see *People* v. *Wrest*, *supra*, 3 Cal.4th at p. 1107.)

The jury has "a duty to apply the law of the [jurisdiction] as given by the trial judge, not its own interpretation of the law or its own interpretation of precepts of the Bible, in determining whether the [defendant] should live or die." (*Jones* v. *Kemp*, *supra*, 706 F.Supp. at p. 1559; accord, *People* v. *Mincey*, *supra*, 2 Cal.4th at p. 485 (conc. & dis. opn. of Mosk, J.); see *People* v. *Wrest*, *supra*, 3 Cal.4th at p. 1107.)

The invocation of "the command of extrajudicial 'law' from any source other than the trial judge, no matter how well intentioned, is not permitted." (*Jones* v. *Kemp*, *supra*, 706 F.Supp. at p. 1559; accord, *People* v. *Mincey*, *supra*, 2 Cal.4th at p. 485 (conc. & dis. opn. of Mosk, J.); see *People* v. *Wrest*, *supra*, 3 Cal.4th at p. 1107.)

Indeed, the "use . . . of an extrajudicial code . . . cannot be reconciled with the Eighth Amendment's requirement that any decision to impose death

must be the result of discretion which is carefully and narrowly channelled and circumscribed by the secular law of the jurisdiction." (*Jones* v. *Kemp*, *supra*, 706 F.Supp. at p. 1559; accord, *People* v. *Mincey*, *supra*, 2 Cal.4th at p. 485 (conc. & dis. opn. of Mosk, J.); see *People* v. *Wrest*, *supra*, 3 Cal.4th at p. 1107.)

The Bible, of course, is just such an extrajudicial code. (*People* v. *Mincey*, *supra*, 2 Cal.4th at p. 483 (conc. & dis. opn. of Mosk, J.); *Jones* v. *Kemp*, *supra*, 706 F.Supp. at p. 1559.) Its commands and prohibitions cannot be viewed as mere reliquiae of a culture separated from ours by thousands of miles and thousands of years. This is because "[t]o the average juror, . . . the Bible is an authoritative religious document . . . ." (*Jones* v. *Kemp*, *supra*, at p. 1559; accord, *People* v. *Mincey*, *supra*, at pp. 483-484 (conc. & dis. opn. of Mosk, J.).)

It is also misconduct for a prosecutor to seek to "minimize the jury's sense of responsibility for determining the appropriateness of death." (*Caldwell* v. *Mississippi* (1985) 472 U.S. 320, 341 [86 L.Ed.2d 231, 247, 105 S.Ct. 2633]; accord, *People* v. *Wrest*, *supra*, 3 Cal.4th at p. 1107.) "[U]nder the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.' " (*Caldwell* v. *Mississippi*, *supra*, at p. 329 [86 L.Ed.2d at p. 239], quoting *California* v. *Ramos* (1983) 463 U.S. 992, 998-999 [77 L.Ed.2d 1171, 1178-1179, 103 S.Ct. 3446].) The assumption underlying Eighth Amendment jurisprudence is that "a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.' " (*Caldwell* v. *Mississippi*, *supra*, at p. 341 [86 L.Ed.2d at p. 247].) This premise is threatened when a representative of the government attempts to undermine the jurors' proper attitude and approach.

It hardly needs mention that "[a] prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the State." (*People* v. *Espinoza* (1992) 3 Cal.4th 806, 820 [12 Cal.Rptr.2d 682, 838 P.2d 204].)[1]

III

On the very face of the record, prosecutorial misconduct is manifest.

[1]Because the issue is not raised in this case, I do not attempt to define "religious" misconduct *by defense counsel*. Certainly, the task would require some delicacy. For example, the provisions of the United States and California Constitutions that constrain the prosecution in this regard—including the clauses concerning establishment of religion (U.S. Const., Amend. I; Cal. Const., art. I, § 4), cruel and unusual punishments (U.S. Const., Amend. VIII; Cal. Const., art. I, § 17), and due process of law (U.S. Const., Amend. XIV; Cal. Const., art. I, § 15)—are generally inapplicable to the defense. (But see Cal. Const., art. I, § 29 ["In a criminal case, the people of the State of California have the right to due process of law . . . ."].) I leave this labor to another day. The majority should do so as well. They purport to distinguish between permissible references to "religion" and impermissible references to "religious law." Their "rule" may be suitable for sophists to debate in rhetorical exercises. It is altogether too vague for the bench and bar to apply in criminal trials.

To begin with, the prosecutor invoked purported religious law in support of the imposition of the penalty of death. That is indisputable.

As noted, the prosecutor stated: "[Defense counsel] says don't play God. [']Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an avenger who brings wrath upon one who practices evil.['] [¶] You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right." The prosecutor returned to the point: "Let him have the opportunity to get his soul right. That's the only way to get his attention. You are not playing God. God ordains authority."

In a word, the "rule of decision" that the prosecutor urged the jury to apply was assertedly religious. He cited the Bible to the jurors. To be sure, he did not expressly identify the relevant passage—which is Romans 13:1-4—as biblical in source and in substance. No such identification was required. There is no reasonable likelihood that the jury understood the words to be anything other than what they were.

Further, the "purpose of punishment" that the prosecutor called on the jury to serve was assertedly religious as well. He exhorted the jurors to destroy defendant's corruptible body in order to save his immortal soul.[2]

[2]In accord with above analysis is *Commonwealth* v. *Chambers* (1991) 528 Pa. 558 [599 A.2d 630]. There, the Pennsylvania Supreme Court considered a claim of prosecutorial misconduct based on comments that "Karl Chambers has taken a life" and "As the Bible says, 'and the murderer shall be put to death.' " It found the point meritorious. Its reasoning was as follows:

"In the past we have narrowly tolerated references to the Bible and have characterized such references as on the limits of 'oratorical flair' and have cautioned that such references are a dangerous practice which we strongly discourage. *Commonwealth* v. *Henry*, 524 Pa. 135, 569 A.2d 929 (1990); *Commonwealth* v. *Whitney*, 511 Pa. 232, 512 A.2d 1152 (1986). We now admonish all prosecutors that reliance in any manner upon the Bible or any other religious

The majority rightly conclude that the prosecutor's impropriety cannot be justified or even excused as "fairly responsive" to comments in defense counsel's summation. True, the prosecutor asserted that he "want[ed] to respond to some of the things argued by [defense counsel]." But there was nothing "fairly responsive" about what he would soon say. Perhaps the matter would have been different if counsel had declared or even suggested that the death penalty was inappropriate under some religious law. He had not done so. Notwithstanding his utterance of the word "God" and his reference to *lex talionis*, his argument was altogether secular—to the effect that the jurors each held an absolute power of life and death over defendant; that they should reject death as empty vengeance; and that they should choose life to vindicate what is good in human beings and human society.

More important, even a "fair response" of this kind by a prosecutor would be altogether impermissible. It is plain from the analysis set out above that the government is prohibited from interjecting religion into the sentencing process. The prosecutor is its representative. The bar that constrains the principal constrains the agent as well.

In addition, the prosecutor sought to minimize the jury's sense of responsibility for determining the appropriateness of death. That too is indisputable.

As noted, the prosecutor stated: "The defense wants to make [the penalty determination] burdensome for you. [¶] Each and everyone [*sic*] of you from here on must live with that decision. Push that button over there. You must live with that decision for the rest of your life.[¶] [¶] Well, if it wasn't you called upon to carry out the will of the people of the State of California,

writing in support of the imposition of a penalty of death is reversible error per se and may subject violators to disciplinary action.

"Here, the prosecutor argued, 'As the Bible says, "and the murderer shall be put to death." ' This reference is substantially different than the references tolerated in *Henry* and *Whitney* where the prosecutor allegorically likened the Defendant to the Prince of Darkness mentioned in the Bible to establish that he was an evil person.

"More than allegorical reference, this argument by the prosecutor advocates to the jury that an independent source of law exists for the conclusion that the death penalty is the appropriate punishment for [Chambers]. By arguing that the Bible dogmatically commands that 'the murderer shall be put to death,' the prosecutor interjected religious law as an additional factor for the jury's consideration which neither flows from the evidence or any legitimate inference to be drawn therefrom. We believe that such an argument is a deliberate attempt to destroy the objectivity and impartiality of the jury which cannot be cured and which we will not countenance. Our courts are not ecclesiastical courts and, therefore, there is no reason to refer to religious rules or commandments to support the imposition of a death penalty.

"Our Legislature has enacted a Death Penalty Statute which carefully categorizes all the factors that a jury should consider in determining whether the death penalty is an appropriate punishment and, if a penalty of death is meted out by a jury, it must be because the jury was satisfied that the substantive law of the Commonwealth requires its imposition, not because of some other source of law." (*Commonwealth* v. *Chambers*, *supra*, 528 Pa. at pp. 586-587 [599 A.2d at p. 644].)

would have been another jury, because that's our system. That's how the law is affected in this state. [¶] Don't once think that you have to feel burdened and depressed because I voted for death. You are doing what the law says if it's substantial, the aggravation substantially outweighs the mitigation. Don't listen to this lawyer talk."

The prosecutor's impropriety in this regard cannot seriously be denied. Indeed, the majority's efforts here are totally nonexistent—and that in spite of the fact that defendant expressly raised the claim in his briefing before this court.

I now turn from the fact of the prosecutor's misconduct to its consequence.

It is the general rule for error under California law that reversal requires prejudice (*People* v. *Gordon* (1990) 50 Cal.3d 1223, 1253 [270 Cal.Rptr. 451, 792 P.2d 251]) and prejudice in turn requires a reasonable possibility of an effect on the outcome when, as here, penalty in a capital trial is involved (*People* v. *Brown* (1988) 46 Cal.3d 432, 446-448 [250 Cal.Rptr. 604, 758 P.2d 1135]).

Similarly, it is the general rule for error under the United States Constitution that reversal requires prejudice and prejudice in turn is presumed unless the government shows that the failing was harmless beyond a reasonable doubt. (See, e.g., *Rose* v. *Clark* (1986) 478 U.S. 570, 576-579 [92 L.Ed.2d 460, 469-471, 106 S.Ct. 3101].)

The prosecutor's misconduct implicates both California law and the United States Constitution. It appears to be subject to the general rule of harmless-error analysis. Thus, insofar as state law is concerned, the "reasonable possibility" standard is applied. Insofar as the federal charter is involved, the "reasonable doubt" test is employed.

The prosecutor's misconduct went to the first, last, and only issue before the jury in the penalty phase of this capital trial, viz., whether they were to take or spare defendant's life. The evidence in aggravation was not insubstantial. But not insubstantial too was the evidence in mitigation.

The prosecutor's attempt to minimize the jury's responsibility cannot be deemed unsuccessful. "A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that

issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion." (*Caldwell* v. *Mississippi*, *supra*, 472 U.S. at p. 333 [86 L.Ed.2d at p. 242].) Comments like those of the prosecutor in this case offered the jurors an easy way to avoid a hard choice—in fact, an especially hard choice, to judge from the relatively close balance of aggravation and mitigation at the penalty phase and the labored progress of the deliberations thereafter.

Perhaps more significant, the prosecutor's argument from purported religious law must have carried special force, incorporating as it did "what many consider an authoritative source—if not Authority Itself." (*People* v. *Mincey*, *supra*, 2 Cal.4th at p. 487 (conc. & dis. opn. of Mosk, J.).)

I acknowledge that the jury did not return its verdict of death immediately after the prosecutor's misconduct and that it also returned three verdicts of life. "That fact means only that [the] impropriety did not instantly [and totally] determine the outcome. It simply does not suggest that it was without improper influence." (*People* v. *Mincey*, *supra*, 2 Cal.4th at p. 487 (conc. & dis. opn. of Mosk, J.).) The majority appear to assume that the force of the impropriety was dissipated in the course of deliberations. A contrary assumption, however, seems more reasonable on this record: the impropriety's force actually determined the course of deliberations and thereby prevented four early verdicts of life.[3]

In sum, the misconduct raises a reasonable possibility of an adverse effect on the outcome, and cannot be deemed harmless beyond a reasonable doubt.

IV

For the reasons stated above, I would set aside the sentence of death.

[3]In accord on this point as well is *Commonwealth* v. *Chambers*, *supra*, 528 Pa. 558 [599 A.2d 630]. As noted, the Pennsylvania Supreme Court in that case held meritorious a claim of prosecutorial misconduct based on the comments that "Karl Chambers has taken a life" and "As the Bible says, 'and the murderer shall be put to death.'" (See fn. 2, *ante*.) "Because the prosecutor's argument in favor of the death penalty reached outside of the evidence of the case and the law of this Commonwealth," concluded the court, "we are not convinced that the penalty was not the product of passion, prejudice or an arbitrary factor and, therefore, pursuant to our Death Penalty Statute, we must vacate the sentence of death . . . ." (528 Pa. at p. 587 [599 A.2d at p. 644].)

APPENDIX B

Denial of Petition for Rehearing
February 10, 1993

SUPREME COURT
FILED
FEB 10 1993
Robert Wandruff Clerk
DEPUTY

No. CR26405
S004765

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

v.

ALFRED ARTHUR SANDOVAL, Appellant

Petition for rehearing DENIED.

Mosk, J. is of the opinion the petition should be granted.

Opinion modified.

Chief Justice

DECLARATION OF SERVICE

Re: Alfred Arthur Sandoval, No.

I, Eric S. Multhaup, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at 235 Pine Street, Suite 1300, San Francisco, California 94104.

I served the attached

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

on the following individuals/entities by placing a true and correct copy of the document in a sealed envelope with postage thereon fully prepaid, in the United States mail at Mill Valley, California, addressed as follows:

Attorney General
300 South Spring Street
Fifth Floor
Los Angeles, CA 90013

I declare under penalty of perjury that service was effected on June 10, 1993 at Mill Valley, California and that this declaration was executed on June 10, 1993 at Mill Valley, California.

ERIC S. MULTHAUP
(Typed Name)

(Signature)

PROOF OF SERVICE BY MAIL

Code of Civil Procedure sections 1013 subd. (a), 2015.5

I declare that:

I am employed in the County of Marin, State of California. I am over the age of eighteen and not a party to the within action. My business address is 235 Pine St. Ste 1300 San Francisco, CA 94104.

On June 2013, I served the attached Petition for Coram... in said cause by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid, in the United States mail at [illegible], California, addressed as follow:

[illegible]

I declare under penalty of perjury and under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on June [illegible], at [illegible], California.

[illegible]